

# EJIMEL

Electronic Journal of Islamic  
and Middle Eastern Law



Vol. 1 (2013)

## Changing interpretations of Shari'a, 'Urf and Qanun

*by Roger Ballard*



University of  
Zurich <sup>UZH</sup>



Vol. 1 (2013)

**Editor-in-Chief**

Prof. Dr. Andrea Büchler, University of Zurich

**Editorial Board**

Prof. Dr. Bettina Dennerlein, University of Zurich

Prof. Dr. Gianluca Parolin, American University in Cairo,  
Egypt

Prof. Dr. Mathias Rohe, Friedrich-Alexander-Universität  
Erlangen-Nürnberg, Germany

Dr. Eveline Schneider Kayasseh, University of Zurich,  
Switzerland

Dr. Prakash A. Shah, Queen Mary, University of London,  
UK

Dr. Nadjma Yassari, Max Planck Institute for Compara-  
tive and International Private Law, Hamburg, Germany

## **EJIMEL    Vol. 1 (2013)**

### **Published by**

The Center for Islamic and Middle Eastern  
Legal Studies (CIMELS), University of Zurich,  
Zurich, Switzerland

### **Suggested citation style**

Electronic Journal of Islamic and Middle Eastern Law  
(EJIMEL), Vol. 1 (2013), pages, <http://www.ejmel.uzh.ch>

**ISSN 1664-5707**

This work is licensed under a Creative Commons  
Attribution-Noncommercial-No Derivative Works 3.0  
Unported License ([http://creativecommons.org/  
licenses/by-nc-nd/3.0/](http://creativecommons.org/licenses/by-nc-nd/3.0/)).

Cover photo: © PRILL Mediendesign/Fotolia.com

# Changing interpretations of Shari'a, 'Urf and Qanun

An anthropologically grounded overview of Islamic encounters with the post-enlightenment premises of European Family Law

by Roger Ballard<sup>1</sup>

## Abstract

*Prepared for a conference on current developments in Islamic Family Law, this paper takes the opportunity to compare and contrast the meaning of 'law' in general, and 'family law' in particular in the classical Shari'a tradition with the premises which currently underpin contemporary forms of post-enlightenment European Family Law. Having done so, it goes on to explore the way in which the institutions of the Shari'a have been comprehensively remoulded (if not yet entirely wholly eliminated) in the course of confrontations with the impact of 'progressive' impact of hegemonic European ideological assumptions, no less in colonial, post-colonial and diasporic contexts.*

## I. The socio-cultural context

### 1. Family life

In common parlance family life has much the same status as motherhood and Apple Pie. It is easy to see why: households whose members are bound together by reciprocal ties of kinship, marriage and descent are a salient feature of all known human societies, and as such they invariably provide the foundation of every local socio-cultural order. But despite an immense degree of internal variance of these structures – if only because conceptualisations as to just how relationships of kinship, marriage and descent can best be articulated varies enormously as between differing cultural traditions – the institution of family life invariably stands at the cusp between the private domain of domesticity, reproduction and sexuality on the one hand, and the wider social and public order. Within that framework, within which these units are the basic building blocks, families take the form of more or less autonomous, but nevertheless systematically interconnected cell-like collectivities.

Yet if this is so, just when, how far, and if so on what basis, can and should efforts be made to subject these cell-like structures to external regulation? How far should be left to settle their affairs, or at least within the context of the local community of which they are apart? Should this task fall to the jurisdiction of overarching institutions of the state within which such families are domiciled? And if so, should such regulation be implemented on a uniform basis, such that all such familial cells within that jurisdiction should be expected to order their domestic affairs according to the same set of conceptual premises? Or is it the case that efforts to impose 'one law for all' in on a unilateral basis in jurisdictions marked by a significant degree of religio-cultural plurality inherently unjust, in the sense that those sub-sections of the population who chose their personal and domestic lives according to premises which differ from those deployed by the

<sup>1</sup> Dr. Roger Ballard is a Consultant Anthropologist, and Director of the Centre for Applied South Asian Studies

dominant majority will inevitably find themselves legally marginalised? And if so, how can the resultant contradictions best be equitably resolved?

## 2. From plurality to uniformity and back to de facto plurality once again

From a legal perspective, these dilemmas are far from unprecedented. Plural societies, in which communities utilising differing sets of religio-cultural premises have found themselves living side by side in the same locality, often on an autochthonous basis, but also as a result of long distance migration, have long been a commonplace feature of human experience. However in many parts of the contemporary world the ancient art of living with difference has been steadily eroded, largely as a result of the impact European colonial expansion, followed more recently by post-Imperial processes of globalisation. Two key developments have come to the fore in that context: on the one hand the more or less universal adoption of the premises of the European enlightenment (albeit in all manner of different flavours) as the only legitimate foundation for governmental practice, and hence for the maintenance of law and order within ideally homogeneous nation states; on the other hand these developments have been countermanded by unprecedented flows of mass migration, such that processes of globalisation have generated additional dimensions of plurality within nation states which had come to regard themselves as intrinsically ethnically homogeneous nation states. (See Gray 2008, 2009, Ballard 2007, 2010 and many others) Against the background this paper is primarily concerned with one of the most troubling features of contemporary global order: namely the processes of ethnic polarisation which have erupted within Dar-ul-Islam itself, as well as within its long-standing alter – namely the Christian *farangis* of Euro-America – during the course of the past two centuries. But whilst the economic, political and military dynamics of this period lie constantly in the background of this paper, my principal concern in this context to explore how far these processes of polarisation have been the outcome of encounters between the ancient set of ideological premises around which the Islamic Shari'ah has been constructed on the one hand, and the ever growing hegemony of the relatively newly minted – and in that sense the 'progressive' – ideological premises of the increasingly post-Christian European enlightenment on the other. Moreover given that the Conference at which this paper first saw the light of day was focussed on Islamic family law in modern Europe and the Muslim world, by analysis focuses heavily especially – although by no means exclusively – on how these issues have played out in the sphere of family life.

In exploring issues of this kind, it is worth emphasising that hegemons invariably stand in a position of ideological advantage, since they can readily ascribe their position of socio-economic advantage to the superiority of the intellectual norms. On that basis they can readily assume that in seeking to make sense of the behaviour of their subalterns, and indeed to provide them with an opportunity to 'progress', it is only reasonable take their own more rational premises as yardsticks of normality. As a result they routinely fall into the trap of assuming that the central focus of any analytical enquiry into matters of cultural difference will of necessity be concerned with identifying those aspects of the subalterns' conceptual premises which have served to 'hold them back', hence, amongst other things, directly confirming the legitimacy of the hegemons' presumed position inherent ideological superiority.

Given the premises of the European enlightenment, as well as two centuries of imperial expansion which followed its initial articulation, the comparative analysis of religio-cultural diversity has been so deeply influenced by just such assumptions. As a result the analysis of difference has all too often been viewed as a one-way street. Hence when efforts have been made to identify the distinctive of character of the cultural premises deployed within subaltern communities, the conceptual foundations of such exercises has all too often been grounded in the hegemons' own taken-for-granted yardsticks, such that the premises of their alters have regularly been found wanting. With such considerations in mind I have deliberately structured my analysis in this



paper in what may seem at first sight to be reverse order, in the sense I have begun by considering the premises currently deployed by the contemporary hegemons – no less in European than the non-European contexts – before moving on to consider how the subalterns have responded to the ideological challenges with which they consequently found themselves confronted.

### 3. The status of the family within the contemporary discourse of Human Rights

In keeping with the premises of the European Enlightenment, contemporary international law identifies access to marriage, and hence to family life and to the production of offspring, as a universal human right. Indeed few other components of the European Convention of Human Rights have a greater potential impact on the course of our everyday lives than does Article 8, which roundly proclaims that 'Everyone has a right to respect for their private and family life, their home and their correspondence'. Yet however much this might appear to recognise, and to indeed to legitimise this key component of human existence, a closer examination of the text reveals that it is so deeply riddled with omissions, contradictions and qualifications that it largely undermines the promise of its opening proclamation.

In the first place the text provides no specific indication as to how the concept 'family life' should be construed; secondly, and just as significantly, careful inspection also reveals that its wording is primarily directed at protecting respect for the private, and in that sense the *personal* aspects of family life; by doing so it thereby wholly (and presumably quite deliberately) overlooks the legal significance of the collectively grounded networks of mutual reciprocity which are necessary prerequisite for the construction of the collectivities in the absence of which that condition of 'family life' cannot be effectively enjoyed.

That said, the real sting in the tail comes in the qualifying reservations set out in the Article 8's second clause, which reads as follows:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Once again we encounter a paradox. Whilst the opening phrase of this formulation might lead the unwary to conclude that that the second clause was designed to yet further reinforce the promise of the first, insofar as it appears to offer families unlimited protection from external interference, its ultimate purpose proves to be quite the opposite. Far from providing members of such collectivities with a guarantee of autonomy, it provides public authorities – the state in other words – with legitimate grounds on which to monitor, and ultimately to constrain, any aspects of familial activity which can be deemed to contradict any a wide of range of public interests, always provided that these interests are democratically – and hence legally – grounded. Last but not least, last but not least second clause also goes on to suggest that such interference can also be justified in the grounds that its purpose will be to protect the 'rights and freedoms of others'. But just who are the potential 'others' whose rights and freedoms which familial arrangements are likely to threaten, given that such arrangements are overwhelmingly confined to a private arena?

A little reflection provides the answer: this component of the formulation provides public authorities with a right to intervene on at least three further counts: firstly when a powerful member of the family is deemed to have been unjustifiably restricting the rights and freedom of more vulnerable members of the family; secondly it opens the way to find that the cultural premises in

terms of which personal relationships within the family are grounded in liberty-constricting 'harmful traditional practices; and thirdly that those premises and practices are 'public safety or the economic well-being of the jurisdiction in question.

From this perspective it of Article 8 has some deeply paradoxical legal consequences. In addition to failing to offer any significant recognition of the multitude of social, cultural, economic and emotional purposes which family life serves to support, it also provides public authorities with clear legal grounds on the basis of which to unilaterally undermine the autonomy – and hence the privacy – this key institutional structure, especially when the premises in terms of which the members of any distinctive minority choose to organise their interpersonal relationships in domestic contexts on a basis which contradicts the expectations of the democratic majority. This can have far reaching implications for public policy, especially in post-enlightenment contexts. In particular it has regularly precipitated the emergence of legislation given rise to wide range of professionally qualified agents – led by Social Workers and to a lesser extent by the Police – whose duty, amongst other things, is to scrutinise the internal dynamics of family units if and when they have reason to believe that the rights of their most vulnerable members are being unjustifiably compromised, together with the power to intervene where necessary in order to protect their rights and interests.

Given the caveats set out in paragraph two of Article 8, it is easy to see how such draconian initiatives can be readily be justified as a matter of public policy. Moreover these developments are particularly salient in contemporary Euro-American jurisdictions, where 'modern' developments – most especially as result the way in which ever greater salience of egotistic individualism has not only exacerbated by ever widening degrees of socio-economic inequality, but has also steadily fractured the integrity of standing kinship networks amongst most sections of the indigenous majority, all too often with disastrous consequences. Hence most contemporary initiatives in the field Euro-American family law are on the one hand designed to legitimise the results steadily growing levels of egotistical individualism amongst ever more confident self-programming adults, and on the other to introduce statutory initiatives which legitimize professional interventions aimed at protecting the rights and interests of children – and indeed of vulnerable adults – as and when networks of mutual reciprocity within familial networks fall apart.

#### **4. Modernity and Plurality**

From this perspective family-oriented jurisprudence in contemporary Euro-American contexts – as in all other jurisdictions in which attempts have been made to follow in its 'modernistic' footsteps – is a specifically post-enlightenment phenomenon. As such is the consequence of the intersection three closely inter-connected developments: a rapid expansion of the power of the state and its agencies; an equally rapid process of urbanisation; and last but not least a steady dissolution of community based – and ultimately of kin-based – networks of reciprocity as the conceptual foundations of liberal societies have become steadily more individualistically oriented.

These developments had two further complementary consequences amongst the indigenous majority, especially in Euro-American contexts. As local communities have gradually disintegrated, so their capacity to monitor the behaviour of neighbours and kinsfolk has steadily declined; and as families have steadily turned themselves inwards to become ever more private spaces, so the prospect of neighbourly efforts to intervene in an effort to resolve internal familial differences has come to be regarded as unwelcome. Instead the more acceptable response has been to call the Police or Social Services. As a result elders within local communities have long since lost their ancient roles as advisors, mediators and arbitrators: instead their former role in dispute resolution has been passed on to state-appointed agents with the force of statutorily grounded family law behind them. But the route more the route dispute resolution has begun to be conducted on this formal, arm's length basis, the greater the likelihood that the underlying

dispute will have got even further out of hand by the time these formal processes spring into action.

It was not always thus. That there has always been a universal need for processes of dispute resolution within domestic contexts goes without saying. Despite family members' intrinsic commitment to mutual reciprocity, the very intensity of the relationships articulated within such networks is such that jealousies and squabbles can all too easily get out of hand. Hence the construction of strategies by means of which to mediate, and ultimately to achieve a form of reconciliation which serves to calm – and better still to eliminate – the underlying contradictions is essential if order is to be restored and violence to be avoided. Dispute settlement in this sense a very much a pre-enlightenment phenomenon: indeed as anthropological research has repeatedly confirmed, such mechanisms are as ancient as family life itself.

It follows that the prime difference between 'traditional' modes of dispute resolution and those currently deployed in Euro-American contexts is the formalisation, and hence the professionalization, of these processes under the *aegis* of the state, if only because local communities have largely lost and/or been stripped of their former regulatory roles. All this has had further consequences: once professionalised on a 'rational', universal, post-enlightenment basis, the conceptual yardsticks which were constructed to underpin these mediatory exercises were rapidly replaced by formal codes; in response to statutory injunctions, further developed on the basis of caselaw, welfare professionals were consequently expected to ply their trade in what soon came to be identified as 'best practice'.

But around just what conceptual premises have current understandings of 'best practice' in the sphere of family law been constructed? Whilst the integrity of family life continues to be regarded as a holy grail, such that all initiatives in this sphere make a careful nod in that direction, interventions are invariably precipitated by concerns about personal safety, and the potential need to take action in order to protect the rights and freedoms of individual members from the unjustified – and indeed unjustifiable – actions and demands of other members of the familial collectivity. Moreover initiatives of this kind are wholly in keeping with the provisions of Article 8. But no matter how rationally grounded the resultant professional premises may assumed to be, they have in no way come out of the blue. Rather they are a product of the specific dynamics Western Europe's religio-cultural history, which were subsequently radically reinterpreted during the course impact of a specifically *European* Enlightenment. Moreover during the course of the past two centuries those premises have been systematically developed in the direction of ever more radical individualism, along a trajectory which it is widely assumed – especially by its ideologically motivated enthusiasts – as leading to an ever greater degree of liberally-minded socio-cultural perfection, which by definition all others should consequently be advised to adopt (Gray 2008).

Given this wider context, it should come as no surprise that the preferred professional and conceptual yardsticks of best practice which are currently deployed in the 'progressive' sphere of family law are far from universalistic in character: rather they reflect the premises of the local statutorily generated jurisdictional norm – or in more vernacular terms, 'the law'. Does this matter? If the all sections of the population of the jurisdiction in question ordered their familial affairs in terms of Euro-America's increasingly 'enlightened' premises, all the issues I have sought to flag would be of little more than academic significance. But as the indigenous<sup>2</sup> inhabitants of every contemporary Euro-American jurisdiction are becoming uncomfortably aware, the world around them is being rendered steadily more plural in character. As a result of what can best be

<sup>2</sup> I must apologise to the descendants of the historical indigenes of the New (at least to Europeans) World which over whom European adventurers imposed themselves during the course of five centuries of European expansion for identifying their hegemony as 'indigenes'. But although technically much better identified as the offspring of colonists, from the perspective of contemporary migrants 'from below', these post-colonial hegemony are best described as indigenes.



described as a process of 'reverse colonisation', substantial ethnic colonies composed of settlers (and their offspring) whose cultural heritage was largely untouched by the impact of the reformation, and whose religious premises owe little or nothing to Christianity, can be found in every major European city. As such their preferred behavioural norms in domestic contexts regularly owe much more to concepts derived from their ancestral heritage than they do to the premises routinely utilised by the indigenes amongst whom they have settled. These differences are far from marginal: on the contrary most settlers (and indeed the majority of their offspring) remain strongly committed to preserving a sense of ethnic alterity, especially in domestic contexts – where their behaviour continues to deviate sharply from indigenous norms. In doing so, they frequently stand many key aspects contemporary post-enlightenment premises on their heads.

## 5. The European Enlightenment and its Discontents

To the extent that the majority of non-European migrants who were of drawn into Euro-America during the past half century had formerly made their living as subsistence farmers, the settlers had little or no previous experience of urbanisation and industrialisation – or of the corrosive socio-cultural impact of 'modernisation'. Rather they were drawn from, and to a large extent continue to order their personal lives within, what Max Weber (1919) suggested was best understood as an 'enchanted', as opposed to the fractured – and hence 'disenchanted' – conceptual universe which had developed in the aftermath of the European enlightenment; Émile Durkheim was making much the same distinction when he drew a similar contrast between societies grounded in 'organic', as opposed to 'mechanical' solidarity.

In another variation of the same argument, this time articulated in terms of comparative jurisprudence rather than the sphere of socio-religious studies, Sir Henry Maine used his observations of customary law in Punjab more than half century highlight a further dimension of the same distinction in his once much celebrated volume *Ancient Law* (1862). In doing so he drew a categorical distinction between those jurisdictions in which interpersonal relationships were primarily organised in terms of long-lasting hierarchically structured reciprocities of *status*, as opposed to those in which these ancient legal methodologies had been swept to one side to be replaced by short term, and hence time bound, relationships of *contract*, negotiated on a presumptively egalitarian basis between autonomous individuals who had no other obligations to one another beyond those specifically identified in the contract to which they had committed themselves. In these circumstances the premises of *caveat emptor* and *laissez-faire* lay at the heart of the game.

But if Weber was writing in the chaotic aftermath of the First World War, and hence acutely aware of the forms of conceptual resilience which had been swept away in the onrush of individualism which had been let loose by the enlightenment, Maine wrote half a century earlier in the immediate aftermath of the publication of Darwin's *Origin of the Species*. Moreover this was close to the high point of Britain's Imperial pretensions, in which such visions of Progress, once again rooted in the self-same premises of the enlightenment, were very much the order of the day; and to that extent that Maine famously utilised his analysis to proclaim that the evolution of progressive societies inevitably took the form of a passage *from status to contract*. In doing so he appeared, at least on the face of things, to have produced yet another empirically grounded argument which served to further underpin the teleological premises of the enlightenment – and, of course, the equally 'progressive' and enlightened character of the forms of governance being developed in Britain's Indian Raj.

However a careful exploration of Maine's comparative analysis of the underlying issues soon reveals that his arguments are much more subtle than they might seem at first sight, so much so that he actively subverts the progressivistic conclusions which hit the headlines. Like many lawyers at the time, Maine was a classicist by training, and one of his key findings with respect to

the customary laws whose premises he had encountered at first hand in India ran remarkably parallel to those which were deployed in pre-Republican Rome: hence his use of the title Ancient Law. However there was no way in which classical scholars were prepared to identify the laws of ancient Rome as 'primitive', let alone 'barbarian'. Given the close parallels which he discovered between Roman law and the customary laws of rural India, it followed that that there was no way was he prepared to apply such derogatory terms in the course of his analysis, no matter how enthusiastically much his more 'enlightened' peers chose to deploy them. Instead Maine engaged in what can best be described as a subversive exercise in comparative jurisprudence, in which he argued while legal premises and practices differed substantially in character as between those jurisdictions in which status rather than contract were the order of the day, the former were in no way intrinsically inferior to the latter (Mantena 2010:82).

But whilst Maine was consequently an early exponent of the merits of approaching the phenomenon of law from comparative, and hence a pluralistic, perspective, he was also a realist, as was only to be expected of a scholar who had served for six years as the Legal Member in administration of the Jewel in Britain's Crown. Moreover in empirical terms Maine's prediction has so far proved to be profoundly prescient. During the century and a half since he put pen to paper, individualistically and commercially driven relationships of contract, and hence of *caveat emptor* and *laissez faire*, have progressively over-ridden morally grounded relationships mutual obligation, and hence of status, in more and more jurisdictions all around the globe. However what Maine did not – and for all sorts of contemporary reasons could not – explicitly emphasise was that he had no great admiration for 'progress' in this sense, even though it was steadily gathering pace around him. But if so, just what have been the consequences of these developments?

As contract in this sense has become the order of the day in contemporary Euro-American contexts – as well as in post-colonial states whose elites sought to follow in their former hegemon's 'progressive' footsteps – virtually all the resultant jurisdictions have found it difficult, if not impossible, to accommodate the *de facto* presence of cultural plurality within their borders – no matter whether that condition of plurality was of indigenous or of immigrant origin. Instead 'one law for all' (as defined by members of the hegemonic majority, and most by members of its highly educated elite) remains the order of the day, no less in post-colonial than in metropolitan jurisdictions.

To be sure well-trained lawyers in metropolitan jurisdictions frequently suggest that the resources of Private International Law can readily resolve such issues of plurality. However this can only occur when at least one of the litigants in legal proceedings can realistically be deemed to be domiciled in some other jurisdiction, whose statutory legal principles can be utilised as an alternative – and more accommodative – route to dispute settlement. However such a stop-gap solution is by definition unavailable in the case of indigenous minorities (such as the Romany gypsies, for example); moreover it also follows that as time passes steadily shrinking proportion of communities of immigrant origin meaningfully be identified as being extra-jurisdictionally domiciled. Furthermore if the legal conventions deployed within such immigrant communities were much more customarily than statutorily grounded, was indeed largely the case, the premises in terms of which members of the resultant ethnic colonies began to order their interactions in domestic contexts were often far removed from those set out in the colonial and post-colonial codes which remain in force in the jurisdictions which they had long since left behind them. Hence members of the communities non-European descent who which have emerged the Euro-American heartlands during the course of the past half century currently occupy much the same legal position as did the Punjabi villagers who had recently been incorporated into the British Raj a century and a half ago. Although nominally subject to the uniform legal codes based in the premises of English law which were being promulgated prior to migration, at an empirical level their inter-personal interactions were articulated within largely self-

governing communities which were typically ordered in terms of ancestrally-generated conventions of customary law – by status in other words, precisely as Maine sought to emphasise. Put like this, it is easy to see why contemporary European jurisdictions find it so difficult to accommodate plurality, especially when the premises of which members of differing sections of the population utilise to order their inter-personal reactions differ so markedly in their conceptual foundations: all of Europe's contemporary jurisdictions currently find themselves facing much the same kind of contradictions as those which Maine observed a century and a half ago. But if this is indeed the case, how can those contradictions best be resolved on an equitable basis?

## **6. Alternative perspectives on 'family life'**

Just what can reasonably be regarded as 'normal' behaviour when it comes to the articulation of family life? Those who enjoy a position of dominance rarely find themselves asked to explain, let alone to justify, the premises in terms of which they order their everyday behaviour. Rather they take their own 'normality' for granted, such that it is only those whose behaviour differs from this common or garden yardstick who are ever asked to explain and justify why they organise their quotidian behaviour on such a distinctive, and hence abnormal, fashion. But if we approach the investigation of patterns of difference on such a myopic basis, any conclusions we reach on this basis will be seriously flawed, if only because they will of necessity be intrinsically ethnocentric in character.

Plurality is in no sense an abnormal phenomenon. Given that we are not genetically programmed to order our behaviour in terms of any particular set of cultural (and linguistic) premises, it follows that the linguistic and cultural codes in the terms of which we humans organise our behaviour are always and everywhere the product of creative but diverse and context-specific processes of historical development. Those (unwritten) linguistic and cultural codes are not transferred from generation on a genetic basis, but rather as a result of processes of socialisation articulated largely – although by no means solely – in familial contexts. However it should never be forgotten that socialisation is an intrinsically creative process: hence for example, adolescents invariably go through a period where they are vigorously critical of the premises into which we have been socialised by their parents, even if they end up bringing up their own children using a mildly tweaked version of the values into which they were themselves socialised in childhood. From this perspective there are excellent reasons to suggest that there is no part of our personal behaviour that is more significantly constrained by the intrinsic ethnocentrism of our upbringing than our own personal lifestyles, even if we continue constantly to tweak those lifestyles as a consequence of our on-going personal experiences.

# **II. From Status to Contract**

## **1. Sir Henry Maine**

Maine was well aware of this when he distinguished between the consequences of deploying premises of status as opposed to those of contract in the organisation of family life – even though the collective character of European family life in the latter part of the 19<sup>th</sup> century had been less severely split asunder by the rise of unfettered individualism which has taken place since then. Nevertheless Maine's vision of 'progress' distinction has proved to be extremely prescient. Given that the majority of non-European settlers who have established themselves in western Europe during the past half century have been drawn from social arenas in which ties of kinship, descent and marriage are far more intense, more extended, more autonomous, and above all more corporately structured than those deployed by the indigenes amongst whom they have settled, for the most part they find very little to admire about the natives' familial premises and practices. In-

deed from their perspective the personal freedom which the indigenes prize so highly is widely regarded as being no more than an invitation to personal hedonism, regardless of any consequences this may have for their kinsfolk, to whom all too many young people feel they have no further necessary obligations once they have reached adulthood – and of course vice-versa.

All this stands in sharp contrast to the articulation of inter-personal relationships in arenas where status rather than contract is the order of the day. In those contexts it is taken for granted that all family members operate within a network of mutual obligations to each other with corporate and invariably more or less hierarchically structured whole. Hence it is expected that those obligations should routinely override one's individual interests – at least until one had been given explicit permission by the collectivity, and most especially by the elders, to pursue them. It also followed that newcomers to the familial corporation – whether arrived by birth or by marriage – did not gain their personal status within the corporate whole solely on the basis of their birth-right; rather they established their rights as family members by fulfilling their obligations to the other members of the corporate whole, so gradually gaining power and influence – stats, in other words – along the way.

In such a conceptual universe it follows that corporate families have institutional priority over the individual persons of which they are composed, all of whom are bound together by ties of mutual interpersonal reciprocity, which can at least in principle be summed up by the dictum, 'from each according to his ability, to each according to his needs'. But since each member is regarded as having a distinct but complementary role to play within the corporate whole, relationships within the collectivity are rarely intrinsically egalitarian. On the contrary they are invariably hierarchical in character, typically as between the sexes, as between the generations, and last but not least as between older and younger members of the same generation. Within this structure superordinates are routinely expected to support and care for their subordinates, while subordinates were similarly expected to respect and obey their superordinates. It followed that the unity and continuity of the family was dependant on the maintenance of these asymmetric reciprocities.

By now it should be clear that premises around which such families are constructed stand at the far end of a lengthy spectrum in comparison with those currently found in post-enlightment Euro-American contexts. It follows that those who have been born and brought up in corporate families of this kind (as is the case with most members of the new minorities) invariably look in askance at the much more libertarian, self-centred and indeed the disenchanted practices of their indigenous neighbours, amongst whom the incidence of divorce (amongst other things) is sky-high. However those self-same neighbours are invariably equally critical of the much more authoritarian premises and practices of the newcomers, not least on the grounds that they routinely seek to arrange the marriages of their offspring, rather than allowing them to choose their partners for themselves.

The scope for mutual incomprehension is enormous in these circumstances. Given the scale of the conceptual gulf between those who rely on premises of mutuality as opposed to those who prioritise liberty and equality – or more generally the gulf between status and contract – those standing on either side of the chasm find themselves equally perplexed, since each side views the premises having unacceptable moral foundations.

Can the contradictions between the underlying conceptual frameworks be readily resolved? Taken as ideal models, I fear not, if only because both systems have their own distinctive strengths and weaknesses. Hence, for example, whilst families grounded in tightly-knit networks of mutual reciprocity provide their members with the prospect of an almost unlimited degree of mutual support, at the cost of (sometimes severe) restraints on personal freedom, their more 'modern', and in that sense more libertarian, counterparts give rise to unprecedented levels of personal freedom – at the cost of those so 'liberated' finding themselves faced in due course with

ever greater levels of isolation and loneliness. Likewise whilst most members of the new minorities still find personal succour in the spiritual resources of their enchanted universes, in the context of their steadily more disenchanted post-enlightened universe the Churches once universally patronised by members of the indigenous majority are attracting ever smaller congregations.

## 2. Wider issues

Nor are developments of this kind to the arena of family life; rather notions of contract in Maine's sense have spread out into almost every dimension of contemporary socio-economic activity, all of which are contractually based. As are such contracts are best understood as legal agreements, often on credit, which serve to facilitate the exchange of goods and services within specified timescales as between autonomous and freestanding legal actors. What is even more significant in this context is that all such agreements are made on the basis of *caveat emptor*. As a result the buyer has no rights over or obligations toward the seller than those explicitly spelt out in the contract. But just how can the terms of such contracts be enforced? Since free-standing individuals have no moral hold over one another, and if disagreements are to be settled on a more equitable basis than force of arms, some alternative means of settling disputes is clearly essential. An integral feature of all contemporary post-enlightenment jurisdictions well-oiled legislatures – together with an equally well articulated system of formally constituted courts of law – stand ready and willing to readily determine and resolve disputes on an equitable basis, which usually take the form of winner-take-all outcomes. Furthermore these state agencies invariably claim monopoly powers within each such jurisdiction: as a result informal arrangements, made on a basis of mutual trust within networks of mutual reciprocity, and hence on a 'customary' basis have largely ceased to have any significant legal traction.

In a globalising world this can have severe consequences for those who choose to swim against the hegemonic tide by continuing to organise their inter-personal relationships on a pre-enlightenment basis. Changes in personal legal status – as, for example, in cases of birth, marriage, divorce, adoption and so forth – have no force unless properly registered the state; similarly transfers of value on an informal basis – especially when large sums are involved – instantly raise suspicions of money laundering. In other words 'informal' status-based arrangements implemented in the public domain are in severe danger of being regarded as criminal in character on the grounds that they are inherently 'contrary to law' (Ballard 2011, 2009).

But before we pursue this line of argument and further we must catch up with ourselves by considering what has been going on in Europe's nearest neighbour: the world of Dar ul-Islam.

## III. The history of law in Islamic contexts

### 1. Roots

Islamic law has even more ancient roots than those from which the distinctive premises which have underpinned the Euro-America's post-enlightenment jurisdictions as they developed during the course of the past two centuries. Moreover as Hallaq (2009) has eloquently argued, during that self-same period Islamic jurisdictions across the globe from Morocco to Indonesia have found themselves subjected to ever growing political and ideological pressure (much of it self-generated) to abandon their traditional premises of law and governance in favour of the allegedly more 'progressive', and indeed more 'rational', premises of the European Enlightenment. As Hallaq goes also goes on to argue, the impact of these developments proved to be particularly severe in the sphere of jurisprudence – no less in post-Imperial contexts than in the earlier periods during previously autonomous Islamic jurisdictions found themselves 'protected' and then



over-ridden by one or other of Europe's imperial regimes. Hence when European empires collapsed during the course of the past half century in no way was the *status quo ante* in the form of ancient Sultanates and Emirates – let alone the Shari'a – restored to its former glory. Instead the nationalistically minded reformists who overthrew who took over the basic the ideological premises of their former masters – most usually in a socialistically oriented format – construct new found jurisdictions. As such these were primarily ordered as nation-states, geographically constrained within the boundaries laid down during the Imperial period, and deploying administrative and legal structures which owed far more to the premises of the enlightenment than to those of *shariah*, *'urf* and *qanun*. Hence as Hallaq observes:

The most pervasive problem in the legal history of the modern Muslim world has therefore been the introduction of the nation-state and its encounter with the Shari'a. It would be no exaggeration to state that there is virtually no problem or issue in this history that does not hark back to the conceptual, structural and institutional discord that exists between the thoroughly indigenous Islamic/customary laws, and the European-grown imports that were the inevitable concomitant of the nation-state and its modern legal system. (Hallaq 2009: 360)

But whilst the great majority of these emergent nation-states identified themselves as being both 'Islamic' and 'democratic' in character, they were invariably founded by members of a small, largely western-educated, and hence 'progressive' elite operating from the top down, whose premises differed radically from the much more traditionally minded peasants and merchants who made up the vast majority of the population over whom they exercised their jurisdiction. Moreover such elites were all too often overwhelmingly drawn from narrowly grounded sectarian backgrounds, although at a political level they simultaneously relied on premises of 'modernity' to justify their refusal to acknowledge the plural character of the newly-created 'nation' over which they had come to preside. As a result the discordances and contradictions which were erupted as between the 'modernist' premises of sectarian elites and the allegedly more 'backward' premises still maintained by allegedly ill-informed peasants in the countryside became steadily more intense throughout the Islamic world, and remain so to this day. The result, amongst other things, has been the emergence of dictatorial and increasingly militarised regimes throughout the Islamic world, now facing ever more vigorous insurgencies – often of a sectarian kind – articulated 'from below'.

Meanwhile it is worth noting that similar contradictions have also begun to emerge in diasporic contexts. Whilst the great majority of the early migrant-workers settlers were thoroughly 'traditionalist' in out-look, they were also accompanied by a much smaller number of formally educated modernist refugees – many of whom were fleeing from dictatorial regimes with which they had fallen out. But whilst mass migration from these sources has declined in the face of ever more draconian immigration restrictions, an ever more substantial second (and hence indigenous) generation has emerged into adulthood, all of whom have found themselves conceptually squeezed between status-based premises of their parent's ancestral heritage and the individualist and markedly disenchanted premises underpinned the intellectual curriculum with which they found themselves confronted at school and college. As a result they have found themselves confronted with by much the same conundrums which students in the Punjab's newly reconstructed found themselves facing in the latter decades of the nineteenth century, and which continue to be experienced by upwardly mobile students drawn from peasant and working-class families in

what remains of *Dar-ul-Islam*. Much of the remainder of this essay is concerned with the dynamics of these processes

## 2. The on-going significance of customary law: Shari'a, 'Urf and Qanun

In the conclusion of his immensely learned commentary on the historical development of Islamic jurisprudence, Hallaq comes to some extremely gloomy conclusions about the current state of the glories of this once-majestic intellectual tradition. Having reviewed what he describes as the impact of 'the sweep of modernity' to which the entirety of *Dar-ul-Islam* succumbed in the face of two centuries of European Imperial expansion, he comes to the conclusion that by the middle of the twentieth century, the point at which the institutionalised aspects of European hegemony at long last collapsed, the Sharia

... had been reduced to a fragment of itself at best and, at worst, structurally speaking, to a nonentity. The chipping away by the modern state of the Shari'a resulted in: first, the collapse of the financial and waqf foundations that sustained the legal profession and its reproductive mechanisms; the gradual displacement of this profession by a class of modern lawyers and judges who came from a newly rising bourgeoisie and/or transformed *ulama* families; third, the replacement of institutional legal structures by modern law faculties and modern hierarchical courts of law; and the introduction of a massive bulk of commercial, criminal, civil and other laws.

The totality of these effects amounted to the effective structural demise of the Shari'a. Although the law of personal status finds its roots in *fiqh* it has been transformed in function and modality into state law, whilst the manner of its functioning, as well as the moral community that permitted and nourished its operation, no longer exist. Together with the *Shari'a*, all manner of artisanal professions, kinship structures, household crafts, and indeed entire ways of life, have met with their demise. (ibid: 500)

From an institutional, and above all from a scholarly perspective, there can be little dispute about the accuracy of Hallaq's conclusions. In the contemporary world classical forms of both governance and jurisprudence have been swept away, not so much because 'the doors of *ijtehad* were closed' – as Orientalist scholars once so confidently proclaimed – but rather in the face of the hegemonic impact of European imperial expansion.

But however much Hallaq's critical conclusions may hold good in formal, institutional, hence administrative contexts, it would be quite wrong to presume that premises and practices embedded in customary practice would likewise be so lightly abandoned. Indeed from an anthropological perspective many aspects of the basic principles of Islamic law remain with us to this day in personal domestic contexts, even if the intellectual and institutional structures in which the classical premises within which the Shari'a once flourished have by now fallen into abeyance. With that in mind it is most illuminating to turn back to the earlier parts of Hallaq's analysis, where he carefully identifies the immense significance of '*urf*, custom, in the context of *usul-ul-fiqh*, jurisprudential practice. Hence just as the *hadith* serve to contextualise and historicise the soaring poetry of the Qur'an, so '*urf* serves to similarly qualify formally articulated principles set out in the Qur'anically based *shari'a*. Hence in keeping with my earlier comments customary practices

throughout Dar ul-Islam have always been inspired by, although by no means necessarily determined by, the guidance set out in the Shari'a. Hence as Hallaq observes,

In pre-modern Islamic societies, disputes were resolved with a minimum of legislative guidance, the determining factors having been informal mediation/arbitration and equally informal law courts. Furthermore, wherever mediation and law are involved in conflict resolution, morality and social ethics are invariably intertwined, as they certainly were in the case of Islam in the pre-industrial era.

By contrast, where they are absent, as they are in the legal culture of Western and, increasingly, non-Western modern nation-states, morality and social ethics are strangers. Morality, especially its religious variety, thus provided a more effective and pervasive mechanism of self-rule and did not require the marked presence of coercive and disciplinarian state agencies, the emblem of the modern body politic. (*ibid*: 160).

Secondly, and just as significantly, Hallaq also emphasises that in sharp contrast to procedures deployed in contractually grounded jurisprudential contexts, Islamic litigants – and indeed non-Muslims who utilised Islamic procedures to settle their differences – were routinely assumed to stand in the midst of a complex network of mutual reciprocities. As a result *Qazis'* verdicts relatively rarely took the form of winner-takes-all judgements in which one party is adjudged to be in the right whilst the other is identified as being wholly in the wrong – as is routinely the case in contemporary Euro-American jurisdictions. Rather the objective of Islamic mediators – who were by no means necessarily fully trained *Qazis* – invariably sought to seek negotiate a settlement which served to restore the integrity of social fabric within which the dispute arose. Instead they routinely sought to do so on a morally equitable basis, often by referring back to the *Qur'an* and the *Shari'a*, and in doing so often took the opportunity to tick off *all* parties to the proceedings. To illustrate the point Hallaq he cites Rosen's anthropologically grounded analysis of contemporary judicial proceedings in a *qazi* court in Morocco, in which

The predominant goal is not simply to resolve differences, but to put people back into a position where they can, with the least adverse implications for the social order, continue to negotiate their own arrangements with one another ... even though the specific content of a court's knowledge about particular individuals may be both limited and stereotypical, the terms by which the courts proceed, the concepts they employ, the styles of speech by which testimony is shaped, and the forms of remedy they apply are broadly similar to those that people use in their everyday lives and possess little of the strange formality or professionalized distortions found in some other systems of law. (Rosen: 39 - 40)

A further aspect of proceedings of this kind is a complete absence of professionally trained counsel engaged to present legal arguments on behalf of the litigants: rather the litigants – together with any witnesses whom they brought along to support their plea – were expected to argue their case in person and in the vernacular; moreover they invariably argued their cases on a

strongly moralistic basis<sup>3</sup>. It also followed that in an effort to do justice (*insaaf*) with respect to the issues before them, adjudicators were routinely particularly attentive to the pleas of weaker parties to the dispute, especially if the stronger party appeared to have been taking every opportunity to exploit his opponent's relative weakness. Hence as Hallaq goes on to note, there is plentiful evidence to suggest that

By all indications, when women approached the court in person, they did so on the same terms as did men, and asserted themselves freely, firmly and emphatically. The courts allowed for a wide margin of understanding when women were assertively forthright, giving them ample space to defend their reputation, honor, status and material interests. They approached the court as both plaintiffs and defendants, suing men but also other women. Women sued for civil damages, for dissolution of their marriages, for alimony, for child custody plus expenses, for remedies against defamation, and brought to trial other women on charges of insolvency and physical assault. But women were also sometimes sued by men on charges of physical abuse. (Hallaq: 188).

In these circumstances it follows that adjudicators makers were not bound by precedent, either in terms of case law or with respect to statutory directions – as is the case in 'modern' contexts. To be sure they would regularly refer to the principles of *Shari'a* in evaluating the behaviour of the litigants; however when it came to the nitty-gritty of their judgements, they paid far more attention to the specific conventions which underpinned local customary law ('*Urf* in Arabic, and *Riwaj* in Persian and Urdu) as they sought to negotiate an equitable settlement. In doing so they had plenty of scope to ground their arguments in terms of *insaaf* and '*urf*, not least because these were precisely the yardsticks which litigants and their supporters would routinely have utilised in arguing their respective corners.

With all this in mind, it is also worth noting that in classical times *qazi* courts were very much more of an urban phenomenon than a rural phenomenon – where either Sufi *Pirs* or tribal elders much more likely to fulfil the role of adjudicator. Meanwhile in the cities *Qazi* courts were normally staffed by locally trained '*ulema*, and supported from the public purse. However these 'judges' were in no sense agents of the state in the European sense: indeed as autonomous scholars, the great majority of '*ulema* were proud of their autonomy, and hence sought to distance themselves from *siyasat*, the necessarily authoritarian – and hence often violent – activities of the state and its ruler. For precisely that reason *qazis* for the most part had little or nothing to do with *Qanun*, the administrative measures which Sultans and Emirs laid down in the form of directive *Firman* which they regularly issued both to facilitate the collection of taxes, and in an attempt to keep potentially rebellious subjects under firm political control.

Hence as Hallaq goes on to observe

Neither the Shari'a nor *siyiisa shar'iyya* [*qanun*, in other words] penetrated deeply enough within the social fabric as to regulate all aspects of social life. To be sure the Shari'a was far more successful than the sovereign in asserting its legal norms within that

<sup>3</sup> South Asian litigants (and their witnesses) find themselves in terrible trouble in English courts when they present their evidence on a moralistic basis as, rather than 'sticking to the facts'. As a result their evidence is frequently dismissed either as unsound or irrelevant. This can have disastrous consequences.

fabric, since it constituted itself as the hegemonic moral and legal discourse in the lives of Muslims everywhere. But whilst the social system was heavily permeated by "Shari'a-mindedness" (which was never the case with political discourse), custom and customary law were conjointly responsible for the operation of the social order and for providing conflict-resolution mechanisms within it.

Having evolved over the millennia, and adapting to every political, dynastic and legal turn, these customs absorbed, and indeed conditioned the principles of Shari'a in multiple and particular ways, depending on the specific local context. Custom and customary law thus stood in a dialectical relationship with religious law; but neither lost their independence from political intervention until modernity and the dawn of the nation-state precipitated radical changes in the structure of the socio-political order during the nineteenth century and thereafter. (*ibid*: 203)

### 3. The fate of shari'a and 'urf in the face of Dar ul-Islam's encounters with post-enlightenment visions of progressive modernity

In the light of all this there is a strong case to support the views that at almost every conceivable level, the premises which underpin virtually all forms of legal practice currently deployed in contemporary European jurisdictions – and indeed in all those non-European jurisdictions in which post-colonial reformers have striven to sweep aside their indigenous pre-enlightenment legal procedures such as the Shari'a – were incommensurate from those which were deployed prior to the arrival of European colonial activity. Hence as the structure of the world order has been since then steadily globalised from above around the premises of the European enlightenment (aka 'progress' and 'modernity') it would seem, at least on the face of it, that prescient visions articulated long ago by both Maine and Weber have by now become overwhelmingly true: just as status has been steadily replaced by more 'rational' premises of contract, so social relationships, and indeed whole social orders, have become steadily more individualised and 'disenchanted'. But if this is indeed the case, is it follows that 'tradition' – whose remaining existence is currently very largely exemplified by premises and practices which lurk in the background in the form of 'unofficial' and/or as 'customary' law – has come to be regarded (at least by enthusiastic supporters of 'progress') as a form of jurisprudence which long passed its sell-by date. But if that is indeed the case, is there any likelihood of the tsunami of jurisprudential rationality let loose by the *philosophes* of the European Enlightenment two centuries ever being tamed?

On the face of things Hallaq appears to take precisely that view, most especially in the light of his observation that 'by the middle of the twentieth century the Shari'a had been reduced to a fragment of itself at best and, at worst, structurally speaking, to a nonentity'. It is clear that there is great deal of empirical evidence on his side, given that his analysis vigorously underlines the extent to which these corrosive processes have been undermining the institutional foundations of Dar ul-Islam during the course of the past two centuries. But despite the strength of his arguments, could it be that despite their steady marginalisation in the face of modernity, the basic premises *usul ul-fiqh* and 'urf have continued to thrive – no less in the contemporary diaspora than in large swathes of Dar-ul-Islam itself? But even if that is indeed the case, their on-going presence is most unlikely to lead to a reconstruction of the Shari'ah system as it once was: history rarely repeats itself. But in the contemporary world it is equally clear that the current applica-



tions of the premises of the enlightenment are also proving to be precipitating deeply troublesome consequences, no less in the metropolitan heartlands where they originated than in the post-colonial jurisdictions whose elites succumbed to the lures of its promises. Could it be that we have now reached a point in history at which the two rival traditions could profitably begin to re-examine their own premises in the light of those of their alters to better enlighten each other?

## IV. An exercise in comparative jurisprudence

### 1. Getting our bearings

To make any sense of such a suggestion, we must first establish our conceptual bearings. To do I would suggest that that the time has come to take several steps beyond Hallaq's groundbreaking analyses in order to take greater cognisance of the logic of *current* developments. Hence if Hallaq's arguments to the effect that the premises and practices around which classical forms of Islamic law differed so radically from those currently deployed in contemporary European jurisdictions (let alone those deployed in all the other non-European jurisdictions in which post-colonial reformists have sought to sweep aside 'archaic' traditions in favour of more 'modernistic' practice) are ultimately incommensurable, such that each finds the key conceptual premises deployed by the other stands in sharp contradiction to its own – as he implicitly, and in my view cogently suggests – if we are to make any progress towards comprehending developments in the contemporary world it is essential to develop a conceptual vocabulary which will enable us to appreciate the logic of both conceptual systems in their own terms, thereby enabling us to explore their respective strengths and weaknesses on a more objective basis.

Given that that starting point in this paper was Article 8, it is worth reprising my earlier conclusions: namely that the premises of family law in European jurisdictions are Austinian in character, in the sense that it is grounded in written norms whose *imprimatur* is underpinned by the state, significant deviations from which are likely to lead to proceedings in formally constituted courts, whose primary duty is to separate rights from wrongs, and where necessary to impose sanctions on those who fail to respect court orders designed to protect the best interests of vulnerable members of the family. Moreover these proceedings invariably take place in camera. Nothing could be more lawyerly in character.

With such criteria in minds the label 'Shari'a Law' is in many respects a comprehensive misnomer, if only because it is in no sense Austinian in character. Its premises were not promulgated by a sovereign of any sort: rather it is a source of personal guidance stemming from many centuries of scholarly effort, aimed at interpreting the contents of the Qur'an and the Hadith in an effort to determine how Muslims can best follow the insights vouchsafed by God to the Prophet Mohammed fourteen hundred years ago. Moreover if the *shari'a* is no way statutory in character, neither is it necessarily perfect, if only because it is a man-made interpretation of the insights vouchsafed to the Prophet as a seal to the Abrahamic tradition. As such it is best understood a comprehensive source of guidance offered to pious Muslims as to the basic premises they should follow in ordering all aspects of their personal lives, with the object of bringing their behaviour into the closest possible congruence with the underlying logic of the universe which Allah created, given that He is ever-present in all its manifestations.

In consequence the *shari'a* is no way a comprehensive legal code. Rather it is best understood as a compendium of behavioural advice derived by scholars from their studies of the Qur'an and the Hadith, directed towards individual Muslims on a personal basis; and since this guidance is *personally* oriented, it has little if anything to say about corporate families, about the wider social

structures of which families are cellular components, let alone about the way in which its premises should be applied in everyday processes of dispute resolution. Nor is the Shari'a a significant source of guidance with respect to the practice of governance, let alone with spiritual and philosophical issues: such matters are primarily the domain of Sufis and hence the Tariqa – a domain which runs parallel to the Shari'a, and which has proved to be far more resilient in the face of the corrosive influence of the disenchanted enlightenment than has the Shari'a. To this day its premises of the Tariqa, in all its many flavours, remains a vital source of spiritual guidance to all Muslims, no matter how closely – or loosely – they follow the guidance set out in the Shari'ah (Chittick 1989, Ballard 2006).

By contrast commonly understood rules and conventions around which '*urf* is constructed may well deserve the appellation of law – always provided that it is understood as law rather than Law. As noted above, just as the accounts of the Prophet's behaviour set out in the *hadith* serve to complement, and to hence to further illuminate, the largely metaphysical teachings set out in the *Qur'an*, so '*urf* – together with the procedural directions set out in *usul ul-fiqh* – to fulfil the same role with respect to the *Shari'a*, in the sense that it provides space within which basis principles set out in the *Shari'a* can be read in such a way that specific local circumstances and practices ('*urf* in other words) can be more equitably more accommodated in active (as opposed to theoretical) processes of dispute settlement. However customary law is far from being 'law' in Austinian terms. It is not statutorily grounded, nor is it enforced by the state, and it rarely if even exists in a written form, if only because it is being reinterpreted all the time. Rather it reflects the current normative consensus of the elders of the community within which it is articulated. Nor is it much concerned about making explicit judgements distinguishing guilt from innocence, let alone imposing sentences of incarceration of those in the wrong: rather it is much more concerned to identify what would be regarded as torts in English law. And having done so it is not so much concerned with physical punishment, let alone incarceration: rather it concentrates on reparation, whose objective is to restore tears which have emerged within the fabric of the established social order on an equitable, and above all a mutually acceptable, basis. As such it is undoubtedly a swift, effective, and indeed a widely deployed vehicle by means of which to settle inter-personal disputes of all kind, most especially when the relationships in question are routinely articulated through tight-knit networks of status-driven reciprocity.<sup>4</sup>

Once considered from this perspective, careful analysis suggests that in Islamic contexts it is primarily within the domain of '*urf* rather than that of shari'a that family law has long been primarily articulated. In consequence it follows that it has never been implemented on any kind of centrally codified basis: rather it has been articulated as a means of repairing and/or reconstructing potential breaches in the established networks of kinship reciprocity – as they are routinely understood in terms of the customary premises and practices articulated within specific local communities. That is no way to dismiss the overarching significance of the shari'a throughout Dar ul-Islam; rather it is reiterate the point that it understood as a vital source of moral and behavioural guidance, rather than a set of formal instructions which must be obeyed come what may, regardless of local circumstances.

Hence as Hallaq acutely observes:

The legal maxim "amicable settlement is the best verdict" (*al-sulh sayyid al-ahkam*) represents a long-standing tradition in Islam and Islamic law, reflecting the deep-rooted perception, both legal and social, not only that arbitration and mediation are integral to the

<sup>4</sup> It is noteworthy that one of the few positive points about the Taliban's approach to governance in Pakistan and Afghanistan is that most (although by no means all) of its courts exhibit these properties, in sharp contrast to the state-run courts which seek to emulate Austinian principles.

legal system and the legal process but that they even stand paramount over court litigation, which was usually seen as the last resort.

Islamic rulers not only depended on this tradition of micro-self-regulation, but indeed encouraged it, for it facilitated efficient and low-cost governance that simultaneously ensured public order. In a society that viewed as sacrosanct, all family relations and affairs, disputes involving intimate and private matters were kept away from the public eye and scrutiny, so for every case that went to court – and these were countless – many more were informally resolved as a result of intervention of the elders, the imam, the household matriarch, or others of equal prestige and authority.

In some cases this was a decisive factor: informal mediation was indispensable for avoiding the escalation of conflict. In communities that heavily depended on group solidarity and in which the individual was defined by his or her affiliation to larger group units, private disputes had great potential of becoming “expandable into political disputes between competing groups.” If the sanctity of family was paramount, it was so also because it constituted an integral part of a larger consideration, namely, the maintenance of social harmony. Attending to and eliminating dispute at the most local level pre-empted the escalation of disputes that might have disrupted such harmony. (ibid 162-3)

From all of this a further feature of distinctiveness also begins to emerge. At first sight the personal guidance set out in the Shari'a might seem to run parallel to the equally individualistically oriented character contemporary forms of European law: indeed in historical terms this is not surprising, since both systems have their roots in the even more ancient Jewish traditions. However such a conclusion is misleading, for despite the strongly contractual character of the Shari'a, it also constantly emphasises that the resulting relationships should always and everywhere be understood in dyadic and hence contextual terms, such that both parties become linked in relationships of mutual obligations no less than rights – with a result, amongst other things, that risks must always be shared. This is in turn rooted in the Qur'anic (and in all probability the pre-Qur'anic) tribal understandings that rights only emerge in response to the fulfilment reciprocal obligations, which – when multiply implemented within any given context – in turn give rise to a dynamic social order.

Hence anyone who looks to the shari'a for an overview of the way in which the which internal dynamics of the corporate structures – whether large or small – to which multiplicity of networks of mutual reciprocity which have established on this basis have given rise will be in for a disappointment. The shari'a is almost entirely silent on such matters. If, however, we accept the self-evident point that shari'a is best understood as an overarching source of personal moral and behaviour guidance, as opposed to Law in the Austinian sense, the key role of 'urf springs directly into focus as the applied counterpart to the formal, and hence much more abstracted, premises set out in the shari'a. In other words it was to localised forms of customary law (with shari'a standing in the background) that Islamic jurisprudence routinely turned for empirical guidance when seeking to resolve breakdowns the everyday dynamics of everyday inter-personal relationships which had erupted in localised networks of mutual reciprocity. Hence as Hallaq acutely observes:

The legal maxim "amicable settlement is the best verdict" (*al-sulh sayyid al-ahkam*) represents a long-standing tradition in Islam and Islamic law, reflecting the deep-rooted perception, both legal and social, not only that arbitration and mediation are integral to the legal system and the legal process but that they even stand paramount over court litigation, which was usually seen as the last resort.

Islamic rulers not only depended on this tradition of micro-self-regulation, but indeed encouraged it, for it facilitated efficient and low-cost governance that simultaneously ensured public order. In a society that viewed as sacrosanct, all family relations and affairs, disputes involving intimate and private matters were kept away from the public eye and scrutiny, so for every case that went to court – and these were countless – many more were informally resolved as a result of intervention of the elders, the imam, the household matriarch, or others of equal prestige and authority.

In some cases this was a decisive factor: informal mediation was indispensable for avoiding the escalation of conflict. In communities that heavily depended on group solidarity and in which the individual was defined by his or her affiliation to larger group units, private disputes had great potential of becoming "expandable into political disputes between competing groups." If the sanctity of family was paramount, it was so also because it constituted an integral part of a larger consideration, namely, the maintenance of social harmony. Attending to and eliminating dispute at the most local level pre-empted the escalation of disputes that might have disrupted such harmony. (ibid 162-3)

It consequently follows that despite the well-established capacity of Islamic rulers to issue administrative orders in the form of qanun, let alone the ever-expanding scholarly commentaries produced by the 'ulema in the course of their efforts to yet further illuminate the guiding principles of the shari'a, by far the greater part of Islamic jurisprudence followed a more or less autonomous trajectory of its own, so much so that largely sidestepped the prescriptive top-down directions emanating from both these sources. Indeed insofar as the ultimate objective of *usul-ul-fiqh* was to facilitate insaaf – justice in the widest possible sense – it followed that it deliberately set codes in the Austinian (and indeed the Biblical) sense to one side. In keeping with the Islamic understanding that the social order, no less than any other feature of the Allah's created universe was a manifestation of the Godhead Himself, the ultimate objective of Islamic law was not so much to create a more perfect socio-political universe, but rather to release the stresses and strains which human negligence had allowed to develop in the existing and thoroughly dynamic social universe which was already a manifestation of the Godhead. It consequently follows that premises of 'Urf, Riway are of necessity both varied and dynamic in character, since their objective is always and ever to resolve and reconstruct the warp and weft of a social universe which – just like all other aspects of Allah's manifestation – is as varied as it dynamic.

In consequence there is a strong sense in which the premises which underpinned classical Islamic jurisprudence as it was delivered at the coalface were closely akin to those deployed in English common law in early mediaeval contexts: in both cases the central objective of jurisprudential activity was to facilitate dispute resolution on a local, as well as more or less private basis, facilitated by respected elders drawn from community within which the dispute in question had erupted (juries, in other words), with the objective of negotiating amicable settlements in the light of the premises of local customary law (Roebuck 2008). Where they may well have differed

however, is in terms of the character enchanted universes which underpinned the two systems. But since I am unfamiliar with the cosmological vision which underpinned early English Christianity, I will have to leave that matter to other specialists.

## **2. The modernisation of English Law**

Likewise my knowledge of the how and when the premises which served to underpin medieval Common Law was steadily marginalised, initially by Canon law, and subsequently by steadily more secularly oriented statutory interventions, articulated on a national basis by Parliamentary fiat (Wormald 2001) is strictly limited. Nevertheless a broad pattern of development is fairly easy to discern. In the early medieval period when the social order was still primarily grounded in ties of reciprocity between kinsfolk, the juries were routinely recruited on a local basis, since personal knowledge of the litigants was routinely regarded as an asset, rather than a liability. Since then, these procedures have since been comprehensively over-turned. Juries (whose members are now recruited at random), since any kind of prior acquaintance with the litigants is regarded as an unacceptable liability rather than a positive asset. And although they may still remain finders of fact in criminal cases (although they are now no longer entitled to interrogate the litigants), juries have by now been effectively been eliminated from civil proceedings, and most especially so from proceedings in the family courts – from which interested members of the public at large are also routinely excluded.

In other words as the premises of the enlightenment have become steadily more influential, so the articulation of family law Euro-American contexts. As a result dispute resolution is now comprehensively subservient to premises articulated by the state and its agents, who decision making is in turn largely expected to be grounded in the premises set out in the European Convention of Human Rights. As a result the touchstone of decision-making in the family courts is to facilitate outcomes which so far as possible maximise individual freedom, qualified only by the overarching need to protect the best interests of children and/or vulnerable adults.

## **3. Recent developments in Dar ul-Islam.**

By contrast developments in Dar ul-Islam have followed a very different trajectory. This was not just because the pieces its jurisprudential jigsaw were laid out on a strikingly different basis from those which had developed in Western Europe, but rather because its internal dynamics were severely interrupted – and eventually swept to one side – by the forces let loose in the process of European Imperial expansion. As we saw earlier, the premises of the enlightenment began to come into force in European jurisdictions towards end of eighteenth century, just before processes of Imperial expansion came into full flow during the next century, as a result of which the European powers, led by Britain, managed to establish a position of global hegemony. Moreover the teleological premises of the enlightenment played a dual role in that process: on the one hand they served to legitimise the process of Imperial expansion as a 'civilizing mission' which would in due course enlighten the barbarians; and on the other it also went on to provide the subjects of this 'mission' with an ideological framework on the basis of which to challenge the political and economic hegemony to which they had been unjustly subjected.

However so great was the influence of these premises – and most particularly amongst members of the newly (western) educated elites whose rebellious efforts hastened the collapse of all these Imperial structures had been so overwhelmed by the logic of these modernistic premises – that when Independence at long last arrived, they promptly set about constructing nation states whose internal structures of governance were modelled on, and indeed exemplified by the 'progressive' premises of the European enlightenment. As a result of these developments the intellectual and conceptual foundations of Islam's classical moral and jurisprudential infrastructure



have largely collapsed – just as Hallaq suggests. But does it necessarily follow that the whole of that edifice has consequently disappeared without trace?

I think not. Despite the corrosive impact of the visions of modernisation which were so enthusiastically adopted by progressively-minded urban elites once they gained control of governance, their top-down initiatives had far less impact on established institutional practices in rural areas, or indeed amongst the inflow of poverty stricken-peasants who have settled on the outskirts of every major city during the course of the past half century. The consequences of all this are now plain to see, especially in the cities, above all because the character of the urban elite has undergone a sea-change. Not so long ago its members provided the conceptual, intellectual, political and economic foundations of Dar ul-Islam. As such its most prominent components included the *madrassah* within which scholarly 'ulema developed and articulated the theologically grounded premises of the shari'a, partnered by administrators who prepared and implemented *qanun* on behalf of the local Emir, together with the merchants craftsmen based in the bazaar. But whilst the bazaaris remain firmly in place, the scholars in the *madrassah* have long since been side-lined professionally qualified engineers, doctors, lawyers and army officers – from whose ranks the administrators of the new order have been drawn.

Meanwhile the great bulk of the population at large occupied a very different behavioural and conceptual universe. This was particularly true in the countryside. Largely ensconced within a multitude of more or less autonomous tribal communities, the majority of whom made their living as peasant farmer, their behavioural premises continued to be grounded in localised understandings of 'urf, further supplemented by spiritual inspiration provided by Sufi Pirs, whose influence largely out-trumped the generally ill-educated mullahs hired to act as prayer leaders in local mosques. As the gulf between the two arenas widened, no less in political and economic than conceptual terms, progressively minded members of the urban elite have made increasingly vigorous efforts to reform and improve the lot of the 'ignorant' peasantry by 'modernising' their traditional forms of governance and jurisprudence. Moreover having at long last been released from the hegemony of Western European capitalism, most such reformists sought to do in socialist terms, often with the active backing of the Soviet Union – which by then developed its own highly centralised interpretation of the premises of the European enlightenment; but as these centralised and usually highly militarised regimes began to implode as governing elites became steadily more predatory in character, alternative visions of utopia led by neo-fundamentalist activists seeking inspiration from the past in order to find a way to a better future began to appear. In the context of Dar ul-Islam these invariably took the form of efforts to re-Islamize the established social order (Gray 2008).

By and large these developments flew over the heads of the rural peasantry, and indeed of most members of the poorer sections of the urban population. Socialistic initiatives routinely became unpopular when their efforts to collectivise threatened to undermine peasant farmers property rights, and hostility to socialism became even more intense when elite activists sought to that religion was nothing more than irrational superstition; and whilst these developments provided neo-fundamentalists with a highly effective platform around which to gather recruits with their alternative visions of utopia, they ran into similar difficulties when they sought to re-Islamise the well-established customs, beliefs and practices of those who already considered themselves to pious be pious Muslims – and all the more so when the neo-fundamentalists invariably proved to be even more incapable of effective governance as and when they over-threw their predecessors' regimes. However to the extent these were very largely urban developments, the customary practices 'Urf and Riway, reinforced by the spiritually oriented premises of local Sufi Pirs, remained virtually untouched in the countryside, regardless of the efforts of the reformers, and despite the steady erosion of the institutions which once provided the organisational foundation of the Shari'a.

Moreover precisely because the bulk of the long-distance migrants who have established themselves in European cities during the past half century were drawn from precisely such backgrounds, it is the parochially oriented premises of 'urf, and riwaj, rather than the more universal-ly oriented premises of the shari'a, which have provided settlers with their principal sources moral inspiration as they constructed ethnic colonies around themselves. Hence it is essentially the customary dimensions of the Islamic tradition which have continued to thrive in western European contexts – in the midst of the jurisdictions within which the premises of the enlightenment were initially let loose. As a result contemporary interpretations of the two traditions have found themselves face to face once again in the diaspora. The time has come to consider the consequences.

#### 4. The on-going impact of Orientalism

The term Orientalism was coined by Edward Said in 1978, as a means of identifying the generally patronizing character of Western attitudes towards Middle Eastern, Asian and North African societies. Further underlining the significance of this concept, Mamdani suggests that

In Said's analysis, the West essentializes these societies as static and undeveloped—thereby fabricating a view of Oriental culture that can be studied, depicted, and reproduced. Implicit in this fabrication, writes Said, is the idea that Western society is developed, rational, flexible, and superior. (Mamdani 2004: 32)

As we have seen, all too many Euro-American studies of Islamic legal procedures have fallen into this post-enlightenment conceptual trap – as have all too many Islamic reformers who have found themselves bewitched by these progressive notions. As a result external observers can all too easily find themselves trapped in a hall of mirrors when they seek to make sense contemporary dynamics of non-European legal systems. This is particularly true of the legal foundations of the Islamic tradition. As a result of institutional support the by now been reduced to such a shadow of itself – and hence has become stagnant – as Hallaq has quite rightly reminded us. Nevertheless it would be grave mistake to assume that the premises of the shari'a have consequently ceased to have any significant traction in contemporary world. Quite the contrary: pious around the globe Muslims still routinely assume that its premises provide the ultimate overarching backstop to their parochial understandings 'urf. But having highlighted the way in which 'urfic premises and practices have always served as a means by which the broadly articulated guidance set out in the shari'a can be contextualised in specific circumstances, careful inspection also reveals that this has always been a two-way process, especially in matters of everyday behaviour – with the result that Muslims in any given community routinely claim that their local customs and practices are ipso facto grounded in the precepts of the Qur'an, the Hadith and the Shari'a, even if no explicit references to anything of the kind can found in any of the kind in any of these sources.

Hence as Hallaq puts it:

While the social system of values was heavily permeated by Shari'a-mindedness (which was never the case with any political discourse), custom and customary law were considerably and conjointly responsible for the operation of the social order, and for providing conflict-resolution mechanisms within it.

Having evolved over the millennia, and adapting to every political, dynastic and legal turn, these customs absorbed, and indeed influenced, the Shari'a in multiple and particular ways, depending on the specific local context. Custom and customary law thus stood in a dialectical relationship with religious law, but never lost their independence from it, or especially from political intervention – until, that is, modernity and the dawn of the nation-state changed the scene in structural ways during the nineteenth century and thereafter.

In the context of mediation we noted the importance of self-ruling groups in effecting conflict resolution. Their ability to negotiate and effect mediation was an integral part of the system of self-governance that they developed over time, a system that was embedded in both custom and morality. (Hallaq 2009: 203)

But if Islamic scholars had no great difficulty in acknowledging the distinction between the formal injunctions set out in the shari'a and their subsequent application in *usul-ul-fiqh* and '*urf*', as well as the flexible and adaptive character of the legal structures to which they gave rise, when European scholars set out to make sense of their new found subjects' legal processes, they looked for material that was congruent with their own prior assumptions – in other words for legal codes. As they did so Orientalism began to run wild. Refusing to acknowledge that own perspectives were anything other than rational in character, they approached their task in a thoroughly Procrustean manner, such that they made strenuous efforts to press the 'primitive' premises and practices of their new found subjects into their own ready-made conceptual frameworks.

Given this ethnocentric perspective, shari'a appeared to be – and indeed is still widely regarded as – the prime source of Muslim law. But having done so, it failed to fit the bill. Its structure – so far as it could be detected – appeared to wholly be chaotic, since failed to distinguish between Canon Law, Civil Law and Criminal Law; similarly it had no clear-cut codes, and no sense of precedents when it came to legal rulings. Hence the 'antics' of the Qazis were dismissed as something out of Alice in Wonderland in an irrational system which was in urgent need of reform.

## 5. Islamic understandings of contract

But if Europe's Orientalist commentators largely overlooked the key role of *usul-ul-fiqh* and '*urf*' in Islamic jurisprudence, not least because it fell, and continues to fall, below their Olympian gaze, it is also worth noting that the shari'a pays a great deal of attention to the institution of marriage, *nikah*. Why should this be so?

In sharp contrast to the Christian tradition, Islam has never been shy of sexuality: rather all adult Muslims – from the Prophet onwards – have been regarded as having a right of access to sexual pleasure in domestic contexts; however this right was also accompanied some specific obligations, not least because families, of which marriage was a key component, was regarded as the keystone of the social order. It consequently followed that so long as the bountiful potential of sexual activity remained untamed, the God-given human capacity for sociality could never be either fully or safely articulated – unless suitably subjected to moral constraints. Moreover in a further sharp contrast with Christian premises, sexual activity has never been regarded as a source of shame, let alone of guilt, always provided that the partners are legitimately married.

Hence the key purpose of the contract of *nikah* – in the course of which both parties took on specific obligations to, as well as rights over each other – was (and is) to socialise sexuality, so replacing potential chaos with social order. Hence *nikah* – just like all other contractual relationships constructed on a similar vein – came to be regarded as an indispensable prerequisite for the maintenance social harmony, and of a crucial component of Allah's creation. This proposition still holds good to this day, which explain why it is that Islamic contexts adults (and especially women) are not only expected to behave modestly in public contexts, but also why it is in sexual activity on an extra-marital basis are routinely regarded a heinous offence which shatters the

very foundations of the social order. As a result the discovery of such relationships still invariably attracts exceptionally severe sanctions.

But if contracts of *nikah* served to identify, and hence to legitimise, key dimensions of the newly established relationship to which marital partnerships gave rise, it has always been regarded as a civil contract. Hence in sharp contrast with Christian, Jewish and Hindu traditions, marriage has never been regarded as sacramental in character. But if *nikah* precipitated a change of status for both parties – as was and is the case in all Islamic contractual arrangements – the tie could nevertheless be unwound. Hence the shari'a explicitly recognises the right of a husband to unilaterally repudiate a wife with whose services he had become dissatisfied by pronouncing a *talaq*, which also required him to transfer the remainder of the *mehr* specified in the *nikahnama* to his divorced wife. Meanwhile a wife was also entitled to seek permission to terminate her marriage in a *khul*, always provided that she could demonstrate that her husband failed adequately to fulfil his obligations towards her; but in that context she would lose the right to claim her *mehr*. Moreover as many ethnographically-oriented commentators have observed, one of the most significant roles of the Qazis was to provide unhappy wives with a *khul* if and when they had been maltreated by their husbands.

What is also notable about these contractual procedures is that they did not need the imprimatur of the state to underpin the agreement's validity. To be sure it was regarded as advisable to call on the services of an 'alim to officiate when the contract was brought into being, if only to ensure that the contents of agreement were recorded in writing in a *nikahnamah*. But in doing so the matter remained a private arrangement which did not require any kind of registration with the state: what ultimately legitimated the contract was not so much the document itself, but it rather the its confirmation of the presence of witnesses drawn from both parties, whose verbal evidence will be called upon should the relationship run into difficulties at some point in the future – precisely in keeping with the expectations of *usul-ul-fiqh* if and when the relationship between the parties should fall out with one another.

All this once again reminds us that the shari'a is in no sense an Austinian legal code. Rather its prime objective is to provide Muslims with theologically grounded guidance as to how they should order their personal behaviour in a manner which is as congruent as possible with that of the ultimate human exemplar, the Prophet Mohammed. But in doing so it nevertheless explicitly acknowledges that as a result of human frailty, some contractual arrangements are bound to come adrift, such space must be found for contradictions to be legally accommodated. Hence procedures for unwinding *nikah* contracts by means of *talaq* and *khul* attract almost as much attention as do the construction of the contract in the first place, although they are also accompanied by admonitions to the effect that such disruptions should as far as possible be avoided, in favour of mediation, arbitration aimed at persuading both sides make concessions to the other in search of some form of reconciliation which can be regarded as acceptable.

Considered from this perspective, the commonplace European assumption that the shari'a could reasonably be regarded as a confused and rather poorly articulated Austinian code – a view which all too many reformists in Dar-ul-Islam took aboard in their aftermath of their encounters with the premises of the European enlightenment – is, and remains, most misleading. This is not to suggest that history should in some way be turned back in order to revive Islamic jurisprudence in all its classical splendour – if only because the both the scholarly and the institutional structure has by now long since disappeared, and it seems most unlikely that it will ever be revived in its original format. But that does not mean, however, that jurisprudence which is characteristically Islamic in style and character has disappeared: rather it still lived on, largely in the form of what can perhaps best be described as 'unofficial' 'urf – if only because the institutions of the Shari'a of which it was once such a crucial component that it have by now all but evaporated.

How, then, does Islamic customary law in the sense manifest itself in the context of the contemporary global order? My own experience suggests that it makes its presence felt in at least two spheres of activity – although there may well be others that I have not come across. In the first place it is as a means of ordering the relationships of reciprocity which underpin the structure of the vast majority of corporately ordered Muslim families, as well the relationships which bind such families together into more or less well organised tribal descent groups; and secondly as the foundation of the coalitions of reciprocity which underpin the logistics of contemporary long-distance transjurisdictional value transfer networks which continue to operate in terms of the ancient Shari'a-based principles of Hawala (Ballard 2013).

Both share wide range of common features. They include: contractually binding networks of mutual reciprocity, such that mutual trust replaces caveat emptor; differences are settled informally by mediation and arbitration, facilitated by senior members of the collectivity in which the dispute erupted, using the cultural conventions of that collectivity as their signposts; litigants speak up for themselves, rather than being represented by formally qualified advocates; a systematic avoidance of formally constituted courts, on the grounds that judges and formally qualified advocates are invariably unfamiliar with their own customs and practices, that trial procedures are lengthy and expensive, and above all because legal proceedings which simply seek to distinguish guilt from innocence routinely ignore the familial repercussions which are precipitated regularly by incarceration, when efforts to identify – and then to re-order – the underlying contradictions can often allow much less collectively damaging outcomes to be negotiated.

## 6. The survival of customary law in South Asia as well as in its external diaspora

Despite my interest in formal legal processes, as a field-working anthropologist I am primarily accustomed to exploring socio-cultural phenomena from the bottom up, on the basis of which I have conducted extensive ethnographic fieldwork in rural communities in Pakistani Punjab, as well as within the thriving Pakistani ethnic colonies which have emerged in the UK during the course of the past century – and as a result of which I have had plentiful opportunities to observe how my informants set about resolving their inter-personal disputes in both jurisdictions.

With that in mind it is worth noting that Pakistan is a classic example of a post-colonial jurisdiction within which contemporary criminal, civil and codes are still rooted in the Anglo-Indian codes of practice which were brought into force as the British Raj consolidated its hold over the sub-continent a century and a half ago. Indeed Sir Henry Maine not only played a major role in their construction, but and thanks to his influence they were replicated in virtually other British colonial jurisdictions, thereby providing them with rationally codes which sought to summarise the key components of English criminal and procedural law.<sup>5</sup> To be sure these codes have all been suitably 'indigenised' by the newly minted jurisdictions which sprang into being after the British departed in 1947, especially with respect to issues of family law; nevertheless the basic structure of the original 1860 codes have been left virtually untouched.

As such these codes remain strictly adversarial as well as strongly Austinian in character, and as such only make a strictly limited range of concessions to the significance of Indic socio-cultural practices, let alone to the significance of the patterns ethno-religious plurality which are, and always have been, such a salient feature of every South Asian jurisdiction, whether the rulers were Hindu, Muslim, Christian or allegedly secular in character. But whilst pre-British rulers invariably left local communities to sort out internal conflicts on their own terms, such that the ruler only intervened with his danda if Panchayats found they were unable to negotiate an equi-

<sup>5</sup> In fact Sir James Stephenson, Maine's successor, went to considerable lengths to persuade the House of Commons to improve legal practice in the UK to utilise his 'Indian' codes as the basis for improving rationalising English Law. However there were too many established English lawyers in the House to let such an initiative pass. Hence all his efforts to persuade the House to implement his Bills failed miserably.



table settlement with which all parties could be satisfied, in the after of 'the Mutiny' (which the indigenous rapidly began to identify as the first war of Independence), India's new rulers decided that they could no longer tolerate this muddle. Hence the construction of the new legal codes, whose premises all District Officers – who were also commissioned as Magistrates – were expected to enforce as a key component of their legal duties.

However unilaterally rewriting the Law on a hegemonic basis is one thing; persuading those subject to such jurisdictional initiatives to take its premises to their hearts is quite another – as many an eager Magistrate soon discovered (Mason 1948). My own much more recent fieldwork confirms that that this is as true today as it was a century ago, no less than in South Asia itself than in the diaspora: wherever one chooses to look, and no matter how the jurisdiction(s) within which they reside may expect them to behave, there is still a strong sense in which the premises in terms of which my informants ordered their personal and domestic affairs remained largely untouched by individualistic premises of the European enlightenment. Nor did they have any confidence that the formally constituted legal procedures implemented through the courts – whether in the subcontinent or the UK – would be capable of resolving their differences on an equitable basis. Instead customary law – in this context identified as *riwaj* rather than as 'urf – remained the order of the day. Likewise their preferred vehicles for dispute resolution, no less in the UK than in South Asia, routinely took the form of informally constituted 'family meetings', *panchayats* and *jirgas* (Chaudhary 1999, Lyon 2004).

But if *riwaj* consequently provided the source of the normative yardsticks in terms of which the behaviour of all concerned was assessed in such contexts, when I asked my Muslim informants about the source of these yardsticks, they invariably responded that the relevant instructions could be found in the Qur'an. Indeed they invariably regarded such questions as no-brainers: after all they were good Muslims who automatically looked to Qur'an for guidance! But if we approach these assertions from a more analytical perspective, just how can we best assess the significance of these heart-felt assertions?

## V. An analytical perspective: 'Family Life' in the context of 'Urf, of the Shari'a and the Qur'an

### 1. The logic of Shari'a

One of the key themes of the analysis I have set out in this paper is that whilst the premises around which the 'shari'a is constructed takes the form of guidance to individuals, almost all discussion of the structures of mutual reciprocity to which the implementation of this guidance gives rise – or in other words the *de facto* social order – is largely outsourced either to the parochial domain of 'urf, or failing that to the political and administrative domains of *siyasat* and *qanun*. But if that is indeed the case, just where does the key phenomenon of 'family law' fit into this structure?

As Hallaq observes, the contract of *nikah* as specified in the Shari'a does not – at least in principle – generate a community of property between wives and their husbands, let alone as between the couple and their offspring. More strikingly still, the prospect that Islamic families might have any kind of corporate character which might extend over the generations is further undermined by the rules of inheritance set out in the Qur'an, which set out precise instructions as to how the estate of deceased person, whether male or female, should be broken up and apportioned between their various surviving kinsfolk in mathematical shares of half, a quarter, an eighth, two thirds, one third and one sixth, depending on the propinquity of each set of kinsfolk to the deceased. I am in no position to comment on how far, if at all, these comprehensively these strong-

ly anti-corporate premises were ever put into practice across the length and breadth of Dar ul-Islam. What I can readily confirm, however, is that in South Asian contexts these individualistically oriented premises and procedures run entirely contrary popular understandings of the significance of interpersonal patterns of reciprocity amongst kinsfolk, such that *riwaj* comprehensively trumps the guidance of the shari'a, just as it does in numerous other contexts.

Hence all I can say from an Indic perspective (and I suspect that the same may well be true in many other regions of Dar ul-Islam) corporately structured multi-generational families – based on much the same premises as those which underpin the operation of Hindu joint families – still remain the order of the day in all the Muslim communities in the subcontinent with which I am familiar. There has, however, been one highly significant change: hence while Hindus and Sikhs follow complex rules of exogamy which precludes the prospect of marriage with their immediate kinsfolk, Muslims (the vast majority of whose ancestors were converts from the Hindu tradition) look on the prospect of marriages between cousins with considerable enthusiasm, following the example set by the Prophet insofar as he chose to marry his daughter Fatimah to his nephew Ali bin Talab, who in due course became the fourth *Rashidun Khalifa*.

None of this should come as a surprise in the light of the historical processes which led to the expansion and development of Dar ul-Islam. As Hallaq notes

In the context of mediation we noted the importance of self-ruling groups in effecting conflict resolution. Their ability to negotiate and effect mediation was an integral part of the system of self-governance that they developed over time, a system that was embedded in both custom and morality. Furthermore, in the village, often far more remote from direct political control than the city, the dominant group was the extended family, clan or tribe. In the city the equivalent communal groups were mainly the professional guilds and neighbourhoods, which likewise enjoyed a large measure of self-rule, even with regard to security and public order. Once corporately constituted as a clan, quarter or guild, these units came to serve crucial administrative functions, most notably as instruments for governing the local populations (ibid: 203).

All this serves to remind us that whilst Dar ul-Islam had its roots in Arabia and the Levant, it expanded with astounding speed to become an Afro-Asian religio-political edifice which soon stretched all the way from *al-Andalus* to the Indonesian archipelago; and although Arabic remained the lingua franca amongst scholars, it was not long before the Muslims speaking non-Arabic languages far outnumbered those that did. In other words whilst the inhabitants of Dar ul-Islam have long been culturally, ethnically, linguistically and indeed religiously plural character, the whole edifice has always been strongly egalitarian in its outlook, particularly, but by no means exclusively, amongst those who have committed themselves to the Shahada. But if Dar ul-Islam has always held an open door to converts, remarkably few of them were driven through such doors by force – regardless of long-standing European assumptions to the contrary. Rather the principal source of recruits to the faith derived from the proselytising activities of Pirs and Sheikhs – Sufi preachers, in other words – whose message was primarily articulated in the enchanted terms of spirituality. In other words Tariqa was invariably the initial route into conversion to Islam, whilst Shari'a followed later – and often much later (see, for example, Eaton: 1993). Indeed the intrinsically plural character of 'urf actively facilitated these processes: so long as long established cultural conventions could be given a gloss which brought them into congruence with broadly articulated understandings of *insaaf* set out in the Shari'a, it could readily be accepted as legitimate Islamic practice. Such was the overall structural character of Dar ul-Islam prior to the arrival of European hegemony.

However to the extent to which a multitude of parochial, and hence 'urfi initiatives provided the popular – and above the autonomous – foundations of Dar ul-Islam, the evaporation of the once thriving institutional resource of the Shari'a has done remarkable little damage to the everyday practice of Islam in a religious sense, or indeed to customary behaviour in domestic contexts:

rather both have continued to thrive to this day. All this stands in sharp contrast to English legal developments, where the Church – and subsequently the State – gradually imposed their hegemony over virtually all forms of jurisprudence, so much so that that English common law has been reduced to a shadow of its former self. By contrast developments in Dar ul-Islam have followed a very different trajectory. Faced with the irruption of European notions of 'modernity', Hallaq is wholly correct in insisting that institutional umbrella of shari'a under whose shadow 'urf both emerged and in due course legitimised itself has by now effectively collapsed. However Islamic law in the wider sense has by no means disappeared. Rather as a result of its encounter with the 'progressive' principles of the European enlightenment, both the making and the administration of Law has effectively passed into a modernised versions of *siyasat* and *qanun*. And although there appears to be little likelihood of the classical edifice of shari'a being reconstructed in the near future, the disappearance of the greater part of institutional umbrella under which the 'common-law' practices of *usul-ul-fiqh* and 'urf originally sheltered and developed has by no means led to their obliteration. Rather they have not only survived in domestic contexts throughout Dar ul-Islam, but have also begun to be actively reproduced in the overseas diaspora which has recently sprung into existence in Euro-America. If so, what kind of trajectories might the future hold in store, no less for the premises of the European enlightenment than for those of Dar ul-Islam?

## 2. To what extent have the premises of the enlightenment turned out to be a false dawn?

During the course of the past two centuries the secularly oriented premises of the European enlightenment – in all its many local flavours – have come to occupy a position of global conceptual hegemony, no less amongst members of prosperous elites than amongst political activists – ranging all the way from monetarist conservatives to fiery revolutionaries (Gray 2008, 2009). The legal consequences of these developments are now plain to see: each member of the ever-growing global flock of contemporary nation-states which recently come into being – and who currently identify themselves as 'the international community' – have all begun to commit themselves to yet further enhancing their condition of autonomous sovereignty. Regularly described (and indeed legitimised) as 'homeland security', the result has everywhere led to a steady reinforcement of the jurisdictional powers of the state. In doing so two interlinked concerns have become particularly salient: firstly in the form of border security, aimed at keeping strict controls over the unwelcome strangers crossing jurisdictional boundaries, and above all the prospect of them being granted full rights of local citizenship; secondly, and just as significantly, in the introduction and statutory policies aimed at enhancing the integrity, and above all the homogeneity, of each jurisdiction's distinctive social, cultural and ideological order.

But if the powers of the state are being systematically reinforced in the sphere of 'border control', at the opposite end of the legislative spectrum enlightened liberal democracies are equally busy introducing policies which seek to promote maximise the space within in which individuals can expect to articulate their personal freedom, driven, amongst other things, by the premises of Human Rights. However closer examination of these initiatives soon reveals that their consequences are proving to deeply contradictory: as states grant themselves an ever more draconian legislative and juristic powers, they have found themselves in a position where they are able – on democratic grounds – both to open up ever widening degrees of personal freedom for members of the indigenous majority, as for example in the steady process of change which rendered divorce ever more accessible, followed by the legitimisation of homosexuality sexual relationships and ultimately of same-sex marriages. By contrast the experience of members of 'alien' minorities the self-same regime has been quite different. No matter whether they are kinsfolk of established settlers seeking to join their extended families from overseas jurisdictions, or established settlers

and their locally born offspring, such 'aliens' found themselves under ever-increasing pressure to adopt the premises of the indigenous majority, and hence to abandon their own preferred interactive behavioural conventions, even in domestic contexts.

Nowhere are the resultant contradictions more salient than in the sphere of family law, where their kinship-based networks interpersonal reciprocity which provide the foundation of their domestic relationships are being steadily being cast into a position of extra-legal limbo, where they are increasingly vulnerable to finding themselves criminalised on statutory ground. If justification of from draconian initiatives is required, it is invariably suggested that their alien lifestyles, and in particular the extended networks of mutual reciprocity to which they routinely give rise, are either actually or potentially criminal conspiracies, or alternatively that they serve to curtail the rights and freedoms of vulnerable members of the collectivity. Hence, for example, the authorities are currently making considerable efforts to monitor the activities of those who might subject their offspring to forced marriages, who might require them to wear a hijab, who lend each other substantial sums of cash without having prepared written records of their transactions, and/or who engage and informally-grounded forms of dispute resolution, ranging all the way from intimate 'family meetings' to so called 'Shari'a' courts are all finding themselves increasingly vulnerable criminal prosecution.

In making sense of all this, it is worth noting that in all these contexts, it is the informality – or to put it more precisely, the lack of formal contractual agreements to back up the corporate character (in the European sense) of the networks of mutual reciprocity within which these behaviours manifest themselves – which invariably appears to be the ultimate sticking point. In other words it is the newcomers' manifest tendency to resile from any kind of commitment to the premises of personal freedom and unfettered personal individualism embedded at the heart of the European enlightenment. Instead they are for the most part managing to maintain a profound respect for mutual reciprocity and hierarchy, further reinforced by a metaphysical outlook of a kind which Max Weber long ago identified as an 'enchanted' conceptual universe (for an example of its structure, see Chittick 1989). Nothing could be more contrary to contemporary European visions of progress, modernity, and ultimately of rationally grounded individual liberty.

### **3. On the history of English individualism and the subsequent construction of 'legal persons'**

By their very nature families are social constructs. They may be large or small, nuclear or extended, matrilineal or patrilineal, hierarchical or egalitarian, as well as monogamous or polygamous: however in all cases they are grounded in relationships of mutual reciprocity, and hence of mutual trust, as between their members. In northern European contexts kinship did not give rise to corporate families in the Asiatic sense, in sharp contrast to the state of affairs almost all varieties of 'urf – and indeed in pre-republican Rome. Hence in the common law traditions which developed in northern Europe families were not only expected to be nuclear in character, but ultimately grounded in the inherently temporary relationship (if only because the inevitability of death) established on a contractual relationship between two spouses. Hence succession by heredity, and hence the possibility of constructing more permanently established corporate families stretching over several generations simply did not arise; nor did hereditarily defined clans, for that matter.

Indeed doing so the premises of early English common law with respect to matters of succession and inheritance seem at first sight to remarkably similar to those set out in the Qur'an, and hence replicated in the Shari'a: namely that the assets of the deceased were broken up, rather than being passed on as a whole to a narrow collectivity of heirs. With than in mind the only difference between the two systems is that whilst the Qur'an specifies the many fractions into which the assets of the deceased should be divided as between differing categories kinsfolk, the Anglo-



Saxon tradition included a provision for asset-holders to draw up wills indicating just how their assets should be distributed post-mortem, in which they were under no necessary obligation to make any provisions for any of their offspring. Indeed as Macfarlane (1979) has shown, the inheritance was regularly implemented pre-mortem, when the land of an elderly peasant could be handed over to any successor he might chose, in return for the provision of so many bags of wheat, so many yards of cloth and so forth after each harvest. From that perspective it is clear the conventions of kinship, marriage and descent amongst the indigenes of northern Europe have changed remarkably little over the course of the past millennium. In keeping with the principles of inheritance nominally set out in the Qur'an, but in sharp contrast to long-standing kinship conventions deployed in the greater part of the Mediterranean and Asiatic world, Anglo-Saxon family structures were so weakly articulated that the hardly merited being described as 'corporate' in character. Rather individualism was very largely the order of the day, no less in familial contexts than in commercial and financial transactions..

However as commercial and financial operations became steadily more complex towards the end of the eighteenth century, the creation of collective (and monopolistic) corporate by royal fiat – as was the case for Britain's East India Company, as well as its most immediate competitor, the Dutch VOC – had become severely anachronistic. To remedy this problem a legal fiction of a kind which was initially devised in Roman Law was brushed off and refurbished as a means of resolving this conundrum. The procedure was quite straightforward: if a body of would-be shareholder they drew up appropriately formulated set of articles of association, they gained the right incorporate themselves as a limited company with a legal personality of its own. Having done so, such corporate entities were deemed to have the same legal status – and hence the same capacity to strike contracts with other such persons – regardless as to whether or not the personality in question legal or natural person in character. This development had far reaching consequences: at the outset it led to the emergence of Limited Companies, but by now has supported the construction of vast Transjurisdictional Corporations who still have the status of 'legal persons', even though they are resident located both everywhere and no-where, and with an annual turnover is often many time larger than the GDP of many sovereign states.

However with exception of the Sovereign Investment Funds controlled by the Emirs of sparsely populated statelets with access to vast reserves of oil and gas, corporate behemoths of this kind are remarkably few and far between in almost all sectors of the Islamic world.<sup>6</sup> But in jurisdictions where status rather than contract (in Maine's sense) was the order of the day, there was no intrinsic need to engage in fictional manoeuvres of this kind. Given the premises of 'urf, such that persons gained their jural status as a result of fulfilling their obligations to each of the collectivities of which they became members, the networks of mutual reciprocity to which such premises gave rise – and which were by no means necessarily kinship-based – were always and everywhere strongly corporate in character, even if their corporateness appeared to be informally grounded from post-enlightenment perspective. It follows that in sharp contrast to Anglo-Saxon premises identified by Macfarlane, in Dar ul-Islam, no less in the past than into the present, persons were routinely bound into a series of organic communities, which together identified their social status.

Yet despite their ubiquity – for organic communities of this kind are in no way restricted to Dar ul-Islam – there is invariably a source of a great deal of confusion when their existence becomes manifest in contemporary Euro-American contexts, largely on the grounds that those who order their social, and above all their financial transactions act as if they were members of a legally

<sup>6</sup> One of the most notable exceptions to this trend is found amongst the Ismaeli communities based in Gujarat, Bombay and Karachi. However it is worth noting that they are relatively recent converts from the Hindu Lohana caste, who have long been well known throughout the Indian Ocean region for their skills as Merchants, Traders and Bankers.



constructed corporation. This can and does create all sorts of problems. Despite having no right to act as if they had a legal personality, they nevertheless routinely distribute and redistribute their collective assets amongst themselves as and when they choose, often across jurisdictional boundaries, without keeping any documentary evidence of what they are up to. Such activities render them wide open to charges of fraud, and worse still of money-laundering – even though such activities would have been wholly legitimate had they incorporated themselves, thereby gaining a legal personality. If so, the solution to the resultant conundrum might seem at first sight to be quite straightforward: namely to incorporate themselves as a means avoiding suggestions that are ipso facto engaged in criminal conspiracies.

Unfortunately this runs into severe difficulties in English law. Precisely because corporations have the status of legal persons, the natural persons whose contractual arrangements have brought these fictional persons into existence cannot simultaneously be an integral component of that corporate being: the one of necessity stands apart from the other. Hence, for example, the two are separately taxed. Hence current legal practice in Euro-American jurisdictions does not permit families, no matter how small or large, to represent themselves as legal persons, even – or perhaps especially – for tax purposes. It is easy to see why: in post-enlightenment legal systems it is invariably individual adult persons – as opposed to informally constituted kinship groups of one kind or another – which provide the foundations of the social order. Of course clever lawyers can invariably find a way around these obstacles by setting up a free-standing private trust of some sort, preferably located (at least in principle) in the Cayman Islands, thereby establishing a corporate entity which is entirely empty of the natural persons who are in fact its ultimate beneficiaries. However such strategies are invariably extremely expensive.

#### 4. Contrasting understandings of social processes

One of the most salient features of the premises of the European Enlightenment is its marked teleological character. In former times, however, it was routinely assumed that the established order was more or less fixed in character. To be sure both the physical and socio-cultural dimensions of those orders were invariably assumed to be dynamic in character – but in no sense along a linear, let alone an intrinsically progressive, trajectory. Rather the best that could be achieved by human actors in an enchanted universe was the maintenance of the local status quo, given that that very condition was in constant danger of erosion as a result of physical disasters at one end of the spectrum, right through to human turpitude at the other. An 'Enchanted Universe' in other words, in which the premises of the Almighty far outweighed those of mere humans, whose ultimate duty it was to sustain the created order as best they could. By contrast the modernistic premises and prospects let loose in the 'disenchanted' context of European enlightenment could hardly have been more different. Rooted in the Protestant Reformation, which was itself significantly inspired by Christian millenarian eschatology, history came to be regarded linear as well as processual in character. In the midst of all this rational thought was expected to progressively marginalize irrational superstition, and perhaps even morality itself, making ever greater space within which individual liberty could thrust tyranny ever more firmly into the sidelines, thereby opening the way towards an increasingly perfect, as well as a more globally uniform, future.

Whilst law in the widest sense was, and still is, an integral component in both modes of articulating socio-political order, it nevertheless plays a markedly different role in each context. Whether we designate the difference between these organisational modes as arising from the disjunction between status and contract, between *gemeinschaft* and *gesellschaft*, between organic as opposed to mechanical solidarity, or at yet more abstract level, as between 'enchanted' as opposed to 'disenchanted' conceptual universes, in the first instance law is invariably customary and conservative in character. As a result it is invariably grounded in the view that the socio-

cultural order is de facto both plural and given, and that the central role of what we can probably best identify as 'common law jurisprudence' is to ultimately sustain, as well as to continually patch up, any stresses and strains which emerge in the socio-cultural order on an equitable basis. By contrast law in the second instance is envisaged as being much more politically active in character, so much so that it readily emerges as a vehicle by means of which to implement social change (invariably depicted as progress and/or reform), and hence as an instrument of social policy, invariably implemented on a statutory basis from the top down. For convenience sake it is helpful to identify these differing approaches to the same underlying phenomenon as law and Law; moreover to the extent that Austin suggested that Law was always and everywhere articulated from above by a sovereign, it follows that law is of necessity a more ancient phenomenon than Law.

But does that mean that Law was destined ultimately to swallow law – as Maine and many others feared? Or can the two be expected to continue to flourish side by side? That the two can in principle be expected to achieve a *modus vivendi* in which they complement one another is very clear from Hallaq's historical analysis of the classical period, when *qanun* was sharply differentiated from Shari'a, and even more so from '*urf*'. However as we have seen, all this appears in principle to have been swept away in the aftermath of its encounters with the 'progressive' premises of the European enlightenment.

## 5. Current consequences

At one level the ideological assumptions of the European enlightenment have proved to be enormously successful, since its modernistic premises (now in many different flavours) have by now achieved a condition of global conceptual hegemony, so much so that they now underpin the constitutional foundations of almost every contemporary jurisdiction. But as Gray (2008) has rightly emphasised, the utopian dreams embedded in these visions of progress have always been strongly iconoclastic in character, as became clear from 1789 onwards. At the outset these revolutionary visions were largely both secularists and nationalist in character, but in recent years they have become ever more explicitly religiously inspired, right across the spectrum way from the apparently unstoppable rise of the influence of Christian right in the United States on the one hand, and to the current ideological impact of the al-Qaida franchise at the other – as a result of which local Salafi movements have begun to mount ever more serious challenges secularly oriented ex-revolutionary regimes across the length and breadth of Dar-ul-Islam.

The results of all this have proved to be deeply paradoxical. Despite having gained a condition of global conceptual hegemony, so much so that it has effectively spread across the entire political spectrum, in all its various flavours these ideological visions of modernity has begun to present a number of characteristic flaws, whose emergence its original authors largely failed to predict – and which are currently giving their utopian dreams a severe thrashing. Given that their dreams were invariably both ideological and iconoclastic, once efforts were made to put them into practice, their efforts were invariably implemented from the top down, if necessary by force if (as was invariably the case) they encountered popular opposition. As a result they routinely found themselves engaged in exercises of violence as they sought to suppress all the antiquated obstacles of 'tradition' – or of 'false consciousness' as the Marxists used to put it – which stood in the way of progress towards a more utopian and egalitarian future.

As the years have passed, these contradictions have led to disastrous consequences. To the extent at that efforts to implement these reforms were invariably initiated from the top down – if necessary by a 'vanguard of the proletariat' – all too many 'enlightened' regimes constrained personal freedom at least as much as it promoted its liberation, especially when the state and its agencies were constantly rendered more powerful than ever, especially, although by no means exclusively, in 'socialist' regimes. Secondly, and yet more significantly, these liberal ideologies had little or

nothing to say about two further issues: jurisdictional boundaries, and the even more pressing phenomenon of cultural plurality. One can immediately appreciate why: as far as the philosophers of the enlightenment were concerned, national boundaries, no less cultural and religious disjunctions were irrational hangovers from the past, which would of necessity be swept away in a utopian future.

Little did they realise just how inaccurate these prognostications would prove to be. As new and more 'rational' – but ever more centralised – jurisdictions came into being, the easy going responses to plurality which were commonplace in earlier times were swept away as national integrity, and hence national uniformity, became ever more pressing priorities. As this occurred so the establishment of defined borders, together with increasingly draconian controls over the passage of both persons and goods across them became the focus of ever more pressing political concerns. Hence far from precipitating a steady process socio-cultural convergence, what we have witnessed during the past two centuries is a steady closure of ranks within an ever-growing range of increasingly prickly national jurisdictions, each of which has become steadily more concerned about maintaining the integrity of their external boundaries, as well as of the purity of their distinctive socio-cultural characteristics.

Nor has globalisation in any way undermined the vigour of these processes: on the contrary it has reinforced them, no less in Western Europe than in the remained of the globe. As labour migrants from the Global South – the majority of whom were Muslims of rural origin – have emerged 'from below' to establish ethnic colonies in the cities of Euro-America, so a major additional dimension of ethno-religious plurality began to emerge in every local jurisdiction. Moreover their presence promptly opened up a crack in regional tectonics which had been relatively quiescent for the best part of a millennium: namely the disjunction between European Christendom and the world of Dar ul-Islam to its East and South. At the heart of this disjunction was an ideological assumption that even more Judaism, Islam was the antithesis of Christianity, of the European cultural tradition, and indeed of morality itself. As a result members of Europe's emergent Muslim minority soon found themselves facing a double whammy. It was not just that they found themselves subject to intense pressure to assimilate – as did members of other minorities of non-European origin – on the grounds that their alterity was threatening to undermine the integrity of the established social order; in addition they also found that any overt manifestation of their Muslim-ness which they might display, whether by covering their heads or constructing minarets, effectively treasonous – on the grounds that it was an explicit challenge to the values of European civilisation (Ballard 2007).

Nor has Dar ul-Islam fared much better in the aftermath of its encounter with the premises of the enlightenment, where the faults have precipitated similar, and in many respects even more serious consequences. In the first place it has allowed its post-colonial rulers to borrow their immediate European predecessors and advisors administrative 'steel frames' to aggregate far more unilateral power to themselves than rulers in the classical period could ever have dream of. But despite the fact rapacious and increasingly violent depredations have begun to promote all manner of revolutionary uprisings, so far, at least, the most successful of these insurrections – whether in the form of the Muslim Brothers, Al-Qaida, the Taliban and indeed in the case of Ayatollah Khomeini's in Iran, the self-same flaws in the premises of the enlightenment have proved to be just socially destructive – if not more so – than parallel developments in Euro-America. It is easy to see why: by bringing Shari'a under direct state control – prospect which was an anathema during the classical period – both rulers, and even more so the revolutionaries, arrogated an unprecedented degree of power to themselves, not least with respect to the behavioural conventions which they now felt they could legitimately instruct all those subject to their rule to obey. But just what were the conventions which they required them to obey? They had nothing to with the spiritual premises of Sufism, or indeed local premises of *urf*, both which they dismissed as

*bida*, illegitimate – and hence superstitious – deviance from guidance provided by the Prophet; they also dismissed Euro-American visions of untrammelled personal liberty – most especially in the case of relationships between men and women – as immoral; but nevertheless they borrowed a key aspect of the 'rationalism' which lay at the heart of the protestant enlightenment, name that if one is ever to get to the bottom of a religious text, one should take care to cast aside all the priestly reinterpretations which had been constructed the better to obscure, rather than to illuminate, its true meaning. Instead they should free themselves individual from weight of external oppression by acting as fundamentalists: in other words they should ignore intrusive scholarship, and go back and read off the original text as if it was an instruction manual. The consequence of this 'enlightened' strategy of strict and uncritical textualism, routinely practiced on a 'cherry-picking basis' has almost everywhere proved to be disastrous.

## VI. Escaping from ethnocentricity

### 1. The key issues

But if these developments have precipitated an increasing degree of socio-political chaos, no less within Dar ul-Islam than in Euro-American contexts, the resultant developments, in contemporary contexts the more families order their inter-personal relationships on an unenlightened' basis – such that that they prioritise mutual reciprocity over individual freedom – the more they are likely to find to themselves at the interstice between two radically different conceptual domains: the autochthonous privacy of the domestic group (and of the wider community of which it is a cellular component) on the one hand, and the premises (or Laws) laid down on a hegemonic basis of the wider administrative system of which it is also a component on the other. It is also worth noting that whilst contradictions of this kind are probably a universal phenomenon in the contemporary world, there are few context This inevitable raises a further series of questions: most strikingly, how far, to what ends, and in terms of what criteria should the state and its agencies have a right to monitor, and hence to constrain, its subjects' interpersonal relationships within their otherwise private domestic arenas? With this in mind it is also self-evident that that these questions become ever more pressing in situations where the families in question have recently migrated from jurisdictions in the global South and have established themselves in one or other Euro-American jurisdictions, in which cries of 'one law for all' – most particularly in familial contexts – are being ever more vigorously articulated by members of the dominant majority.

However once viewed from an anthropological, and hence from a comparative perspective, it is quite clear that no matter how we choose to cut the issue, there is no such thing as 'universally applicable' family law, let alone Law. Nor is there any no reason to suppose that there ever will be. Culture, like language, sets the conceptual framework within which we order our everyday transactions in the communities of which we are members, and in that sense it is a vehicle for communication. Hence the less we familiar with the lexicon and the grammar – and in a wider sense the cultural premises – deployed by those with whom we seek to interact, the greater our mutual misunderstanding will be.

But even though there is an ultimate sense the differing cultures and languages are ultimately incommensurate with one another, it does not follow that that there is no prospect of building and crossing bridges between them. To extent that linguistic and cultural codes are learned, rather than being genetically, it is self-evident that we humans can readily learn, and hence learn to communicate in, several of these codes at the same time – provided that we have the opportunity and the will to do so. Moreover as anyone who is bilingual can readily confirm, languages code the world around us

using different criteria. Nor is that all: in doing so they will also begin to realise that each such code has its own strengths and weaknesses, especially when it comes to articulating complex ideas. By contrast hegemonic monoglots who have long since concluded that there is no need to familiarise themselves with their inferiors are acutely vulnerable to the silent pit-falls of ethnocentricity – such that those who ought to know better to fall into the trap of assuming that 'our' cultural premises are *ipso facto* superior than 'theirs'.

Given the specific character of their religio-cultural inheritance, and especially the recent achievements of the European enlightenment on a global scale, Euro-American analysts are in my experience particularly vulnerable to these pitfalls. This is particularly true if they have been bewitched by the positivistic premises and associated conceptual categories generated in aftermath specifically *European* enlightenment are of necessity of universally applicable. No matter how successful these premises may have proved to be in the natural sciences (in which there is much less scope for ethnocentric ideologies to develop), current developments suggest that this is anything but the case in the social sciences despite the fact that established European conceptual categories are all too often turning out to not only to be inherently flawed, but to be clumsy analytical sledgehammers in cross-cultural contexts.

## 2. Re-writing our analytical vocabulary

As an anthropologist with strong comparative interests, and with such considerations in mind, I have found it extremely illuminating to look beyond the limitations of our own parochial heritage in search of more fine-grained (and above all less unconsciously ethnocentrically grounded) analytical categories, the better to engage in comparative analyses. Indeed as I have already sought to demonstrate, logic of what is all too often assumed to be a singular edifice of 'Shari'a Law' can be much better appreciated if it is disaggregated into four distinctive, but nevertheless comprehensively inter-related, components.

### a. *Deconstructing 'religion'*

However this is not the first time I have sought to engage in an exercise of this kind.. As can be seen from Table 1 below, in the light of my ethnographic observation of religious belief and practice amongst Sikh, Hindu and Muslim communities in Punjab, I set about constructing a comprehensive analytical framework which would serve to comprehend the multiple dimensions of 'Religion' into which the beliefs and practices I had observed within all three communities could be conveniently be classified, not least in terms of the various functional purposes which each of these dimensions served (Ballard 2011b, Ballard 2000).

I should also add despite making this diversion into matters of religion in course of summing up a paper which is primarily devoted to matters of law, there is nevertheless method in my madness. In the first place the figure below provides a convenient means of highlighting the logic of my preferred analytical methodology, and in the second it provides a convenient means of identifying the distinctive way in which issues of 'religion' intersect with 'law' in Dar ul-Islam, no less in classical than in contemporary contexts.

As can be seen from the Table below, I have not only avoided using the term religion the first in column, even though all these five dimensions can – as the second and third columns confirm – can in some sense or other be interpreted as such. But to the extent that the European concept of 'religion' consequently reveals itself as a sledgehammer, and an ethnocentric one to boot, I have devised an alternative set of carefully defined analytical categories, all of which I deliberately labelled using terminology drawn from non-European/non-Christian sources, to identify the key distinctions which I have set out in the central column of the table – which in my view may well prove to be more or less universally applicable.



Secondly, and more importantly still in this context, in this version I have also taken the opportunity to add final column to my model, in which I have 'translated' the three broadest categories 'religion' which to which this model identifies can be mapped onto the key three socio-religious categories around which I would suggest Dar ul-Islam has been constructed: *Tariqa*, its spiritual and philosophical dimension, Shari'a, its principal source of ritual, social and behavioural advice, and finally *Siyasat*, politics, which has emerged as the sphere of governance and hence of *qanun*.

<i>Sphere of Activity</i>	<i>Significance</i>	<i>Definition</i>	<i>Euro-Domain</i>	<i>Islamic Domain</i>
<i>Panthic</i>	Spiritual/ Gnostic inspiration	The ideas and practices deployed by those in search of spiritual and mystical inspiration, invariably under the guidance of a Spiritual Master (e.g. <i>Pir</i> , <i>Yogi</i> , <i>Sant</i> , <i>Swami</i> or <i>Guru</i> )	Spiritual/ Occult	<i>Tariqa</i>
<i>Kismet</i>	Occult/ Making sense of the world	The ideas used to explain the otherwise inexplicable, and the occult practices deployed to turn such adversity in its tracks; both are usually deployed with the assistance of a Spiritual Master.		
<i>Dharmic</i>	Morality/ Social order	The moral ideology in terms of which all aspects of the established social and behavioural order is conceptualised and legitimated.	Social	<i>Shari'a</i>
<i>Sanskritic</i>	Rites of passage/ social reconstruction	The set of ritual practices – and most especially those associated with birth, initiation, marriage and death – which celebrate and legitimate each individual's progress through the social and domestic order.		
<i>Qaumic</i>	Political/ Ethnic mobilisation	The use – and more often than not the reinterpretation – of religious ideology as a vehicle for collective social and political mobilisation. The typical outcome of this process is that an increasingly clearly defined body of people begin to close ranks on a morally sanctioned basis the better to pursue shared social and economic objectives	Political	<i>Siyasat</i>

**Table 1: Five (potentially universal) dimensions religious activity as observed in Punjab**

*b. Deconstructing Law*

However my central concern in this paper is not so much to de-construct 'religion' – although that is undoubtedly an underlying component of my argument – but rather to perform the same kind of exercise with respect to the phenomenon of law. However in this case my objectives are considerably less far reaching, since I make no claims – at least at this stage – that the categories I have identified are universally applicable, since at this stage my analysis is restricted solely to an initial exploration of the parallels and differences as between the premises in which post-Austinian jurisprudence has been founded as compared with those which underpinned its classical Islamic visions of law and jurisprudence, as well as the impact which the former has had on the latter during the course of the past two centuries. It is with precisely these considerations in mind that I have drawn up the table below.

Sphere of Activity	Significance	Articulator	Practice	Domain	European legal parallels
<i>Qanun</i>	<i>Administrative directions</i>	<i>Sultan, Emir</i>	<i>Siyasat</i>	<i>Politics</i>	<i>Statutory Law</i>
Shari'a	Moral and Spiritual Guidance	'Ulema, Maulvi, Pir	Tabligh	Personally directed behavioural advice	Canon Law
<i>Usul ul-Fiqh</i>	Jurisprudence	<i>Qazi/Elders</i>	<i>Jirga, Panchayat, etc</i>	Dispute settlement	i. Restitution ii. Incarceration
'Urf	Local cultural premises and practices	<i>Buzorg, Elders</i>	Riwaj	Custom	Common Law

**Table 2: Differential dimensions of 'Law' in Islamic contexts**

As we have seen, one of the most salient features of classical Islamic law, and most especially of the Shari'a, is that its implementation was largely independent of the state. This was not because Islamic law emerged in the absence of powerful centralised states. Quite the opposite. Rather it was because the structure of Islamic governance fell into the field of *siyasat*, politics, and its activities were primarily administrative, and hence fell into the legal category of *qanun* rather than Shari'a. But to the extent to which Shari'a, the interpretive field of *usul ul-Fiqh* and customary '*urf*' were all in consequence largely autonomous of the state, and directed much more toward dispute settlement and the equitable restoration of the established social order at a communitarian level, they relatively rarely trod on the toes of the Emir's *qanun*: indeed it was only when these processes of dispute settlement failed that to sort matters out that the Emir might be persuaded to intervene from above to settle the matter in keeping with his administrative duties.

Two further points stand out in the midst of all this: firstly, given the central significance of '*urf*' in the process of *usul ul-Fiqh*, the classical Shari'a tradition was as fluid as it was adaptive to local circumstances; secondly, when considered from a contemporary European perspective the classical edifice of the Shari'a can usefully be regarded as being rooted in what might be identified, if somewhat crudely, as a melange of Canon and Common law. However in comparative terms the one of the key feature of this structure is personal law, which rapidly crystallised as '*urf*', was autochthonous in character, and in no sense directly open to state interference; and whilst the sovereign was a powerhouse in direct charge of governance, and hence of *qanun*, Law in the Austinian sense, his behaviour was still subject – at least in principle – to the premises of the *shari'a*.

### 3. The demise of the classical structure of the Shari'a

However Hallaq has made it abundantly clear, in the aftermath of two centuries of European Imperial expansion, by the middle of the twentieth century – by when all the many components of Dar ul-Islam had at long last escaped from the clutches of European hegemony, the Shari'a in its classical sense had at best been reduced to a fragment its former self, and at worst, structurally speaking, to a nonentity, largely as a result of its encounters with the 'modernising, 'rationalis-

ing' and above all the allegedly progressive premises of the more firmly secularly oriented visions which had been promulgated globally in the aftermath of the European enlightenment.

This certainly did not mean that Dar ul-Islam had evaporated: rather it had been radically transformed, in a manner which can readily be appreciated with reference to the two interlinked models which I have laid out above. The core of Hallaq's argument, as I understand it, is that in the course of the steady rise of European political and intellectual hegemony during the course of the past two centuries, the intellectual core of Dar ul-Islam – in other words the Shari'a and all its works – was steadily shredded, largely as a result of the success of European missionaries in rolling out an alternative educational system, without access to which members of indigenous elites in colonised jurisdictions could not hope to retain their position in the newly emergent Imperial order. As a result members of established elites in almost every jurisdiction which was subjected to European hegemony – and indeed in virtually all of the remaining jurisdictions which managed to avoid that fate – took steps to ensure that their offspring gained access to 'modern' forms of education, since that was manifestly the only way in which they could hope to compete on level ground with their new-found hegemon.

However this relatively rarely led to the conversion to Christianity which the missionaries so fervently hoped to achieve; and even when that did indeed occur, converts frequently began to re-read the bible in their own, often Pentecostalist and hence liberationist terms. However this kind of re-reading of a pre-existent code was by no means restricted to nominally all-out converts. Similar rereading also began to emerge those who resisted conversion, not least in an effort to counter their new-found hegemon's constant arguments to the effect that their own indigenous behavioural premises and practices were inherently backward, primitive and irrational. As a result an ever larger proportion of the rising educated generations became ardent reformers – in which they at least partially accepted the force of the arguments directed at them by their allegedly more enlightened teachers. Nevertheless they rapidly became aware that their proselytising activities were also intrinsically hegemonic in character, with the result that they largely refused to take the medicine wholesale. Instead they sought to 'modernise' those parts of their heritage which their critics found most egregious – typically by making strenuous efforts to bring it into conformity with the European enlightenment, whilst still preserving the metaphysical essence of their tradition.

The structural consequences of all this are now plain to see, especially in Islamic contexts. As elites throughout the Islamic world steadily turned their back on Islamic scholarship in favour of more 'modern' and 'progressive' education, and as financial support for the institutional foundations by the state fell away, so the developments which Hallaq so vigorously laments became steadily more salient. But this did not spell the end of Dar ul-Islam, no matter how much damage may have been by the virtual collapse of vast scholarly enterprise which had once underpinned the operation of classical *Shari'a*, which had hitherto been one of the two keystones which underpinned the whole edifice. But although the reformers also did their best to dismiss Tariqa, the spiritual and metaphysical dimension of Islam, on the grounds that its many stands could safely be dismissed as 'irrational superstition' which had no place in a more enlightened vision of Islam, the spiritual core of the Islamic tradition still retains an enormous following, no less among intellectuals than amongst ordinary folk; likewise the customary sphere of '*urf*', of which the reformers were equally critical on the grounds that its premises deviated from the principles laid down in the Qur'an, remained largely untouched at a popular level – and hence also continues to thrive until this day.

#### 4. The emergence of neo-fundamentalist interpretations of Islam

Nevertheless the collapse of Shari'a as it was originally conceived had far reaching implications, for its influence still remained even as it was subjected to radical reinterpretation, whose dynam-

ics can be readily appreciated if approached bearing in mind the conceptual distinctions with the sphere of both 'religion' and 'law' which I have set out in my models above.

As far as developments in the field of religion are concerned, Tariqa has remained as vital as ever in both intellectual and popular contexts; the spiritual and meaning-and-purpose generating dimension may have been pushed underground by the politically minded reformists, but it has most certainly not faded away into oblivion in the manner which the rationalists once assumed would be inevitable. Meanwhile at the other end of the spectrum the use of religious ideologies as a vehicle around which to build *qaumic* mobilisation has increased by leaps and bounds. This phenomenon has in no way been specifically Islamic: on the contrary there are excellent grounds on which to suggest that western European Christians were amongst the earliest articulators of this tactic, when they released a series of Crusades to remove the Muslim infidels from 'their' Holy Land. But although the Crusaders did not manage to hold Jerusalem for much more than a century, this in no way brought the European Holy War to an end: rather it gradually morphed into a vision of *conquistadores*, who were prepared to use force in order to introduce infidels all around the globe to the teaching of Jesus Christ. But whilst this vision of religiously legitimated conquest did not survive the enlightenment, it did not disappear. Rather it morphed itself once again into a strictly ideologically grounded exercise aimed at conversion, implemented by a huge army of Missionaries who spread out in the territories over which the European powers had established their hegemony.

This is no place to discuss the many facets of the missionary exercise; my reason for doing so at this point lies elsewhere. Looking at the issue from the other side of the fence, one of the most salient features of Euro-America's post-enlightenment Imperial adventures is that they were all deeply ideologically grounded – ultimately on a strongly *qaumic* basis. Moreover as Isaac Newton long ago observed, "To every action there is an equal and opposite reaction", a point which is just as salient in processes of socio-political mobilisation as in the laws of motion. Moreover when such processes are *qaumic*, and hence ideological in character, the subalterns frequently borrow the premises of their hegemon, only to stand them on their heads. Indeed that, I would suggest, has been precisely the fate of the *Shari'a*. However in doing so it is not so much that the *Shari'a* itself which has been up-ended, but rather that its premises have been shifted by the reformers into an alternative location in the socio-political spectrum: in a word it has been systematically recast as *Qanun*.

The Islamic reformists were by no means alone in undertaking this exercise, and it is easy to see why they took it. In need of an ideological vision with which to trump their hegemonic premises, and in order to do so on indigenous, as opposed to alien, premises, they re-wrote – and are continuing to re-write their indigenous premises in such a way as to establish an upside-down mirror image of the ideological premises of their opposite numbers. As a *political* manoeuvre such a strategy is highly effective, if only because the upside-downers on both sides of the chasm regularly come to the conclusion that the anger and contumely of their opponents only serves to underline the righteousness of their own position. If ever the 'rational' premises of the European enlightenment had had a systemic downside embedded in its core, it is in its capacity – currently manifested in all its appalling glory – to precipitate such processes of *qaumic* polarisation. Indeed the disease is becoming increasingly infectious, not least within Dar ul-Islam itself. If these processes were originally set off as a result of encounters with the premises of the enlightenment on the basis of which their new-found European hegemon sought to legitimise their activities, after many adventures – in which the ancient Christian/Muslim bifurcation still plays a salient role – two even more serious sets of polarisations have recently emerged: those between the antics of the increasingly violent Salafi neo-fundamentalist on the one hand, and the vast majority who remain committed to more ancient, and far more popular interpretations of spirituality and custom, and secondly the even more violent confrontations which have more recently arisen as between rival neo-fundamentalist, as can currently be witnessed as between Sunnis and Shi'as.

## 5. Is there a way out? On babies and the bathwater

The philosophers of the 18th Century enlightenment insisted that they had identified the only meaningful route towards a better, more perfect and above all a more rational and 'scientific' future in which individuals would have access to ever greater levels of prosperity and freedom

- under the protection of a benign democratic state
- whose Parliament would draw up legislation on rational, and in that sense on an Austinian basis
- which would serve to protect and sustain human the rights of all those subject to its jurisdiction

Two further premises also lay behind these assumptions:

- That the ever-growing impact of scientific rationality would ensure that archaic and irrational cultural differences as between jurisdictions would rapidly be eroded, and would eventually disappear
- That all restraints on personal freedom imposed by parochially oriented collectivities (other than those actively sanctioned by the state) would inevitably face a similar fate

One can only admire these idealistic premises. But how far have the teleological expectations which underpinned them actually been fulfilled in the contemporary world order? Given the analysis I have set out in this paper many aspects of these premises are proving to be deeply flawed, no less with respect to developments which have recently taken place in Dar ul-Islam than in contemporary Euro-American jurisdictions. But despite the serious character of the flaws which have consequently emerged in both kinds of jurisdiction, in no way do we need to start over from scratch – an impossibility even at the best of times, if only because every cultural system follows its own dynamic. But if that is indeed the case, and a re-think is indeed and urgent priority, it is vital to ensure that we preserve the resources of each respective cultural baby, whilst carefully discarding the unhelpful bathwater. However it is not just that both the baby and the bathwater have strikingly differing characteristics in the two conceptual arenas on which I have focused, such that both call for differing remedies; rather I would argue that far from engaging in a conceptual version of ethnic cleansing, both systems can benefit a great deal from borrowing from the other – always provided that they make the appropriate right choices in the course of so doing.

## 6. Flaws

If only to contain the scope of my analysis, in the concluding section of this paper I have chosen to restrict my analysis to a consideration of two very different, but nevertheless particularly egregious socio-cultural crises which are currently such a salient feature of the contemporary global order, and to which no coherent solutions have so far been articulated

- Why is it that the moral foundations the social, economic and above all the familial premises in terms of which the indigenes of Euro-America routinely order their affairs have recently descended into a chaotic mess?
- And why are parallel efforts (albeit in the reverse direction) to “enforce the shari'a” as if it was some kind of authoritative



Austinian code proving to have equally disastrous (although differently structured) consequences in Muslim contexts?

In my view there is a strong sense in which the contemporary flaws in each context are intimately connected, albeit in an antithetical sense, since they flow, in each case, from key premises embedded at the core of the enlightenment. However in doing so I also wish to suggest that a powerful remedy for those flaws has always been present as a key feature of the jurisprudential premises embedded in the Shari'a – always provided it is read in the classical sense rather than viewed through a post-enlightenment prism as *qanun*.

With this in mind one of the most salient features of the enlightenment perspective on human affairs is that although it promises a maximum degree of liberty to citizens within any given jurisdiction, and consequently seeks to sweep away all sorts of hierarchical constraints – including, once pressed hard enough, the institution of the family itself – in no way does it promote anarchy. Hence whilst the philosophers who responsible for the construction of the edifice were hostile in the extreme to hereditary monarchs, they routinely assumed that a powerful state must be ready and willing to guard the individual rights of the citizens of any given jurisdiction, as well as the integrity of the spatial and ethnic integrity of the nation state which was the very foundation of the jurisdiction itself. In other words this was the antithesis of anarchy: having swept away hereditary monarchs, it replaced them with unprecedentedly powerful, but still-sovereign, nation-states.

Of course they also presumed this power would routinely be constrained by democratic processes, a vital element in all such systems. Nevertheless there were still a number of large flaws in the ointment, which soon began make themselves felt as soon as its premises were brought into practice. Some of the most egregious can readily be identified. They included:

- Who could properly be identified as a citizen? Women? Slaves? Children?
- Who could properly be identified as a member of the nation state? Minorities? Immigrants?
- How should the interests of minorities be adequately represented in the National Assembly – if indeed he those who stood outside the magic circle deserved to participate at, all?
- Should there one set of laws for all citizens – which members of all such minorities would consequently be required to respect and obey?
- If a central function of the state is to promote the freedom and liberty of those subject to its jurisdiction, to what extent should its agent intervene in 'family life' in cases where interpersonal relationships between its members are so strongly hierarchically structured that its junior-most members deserve to be liberated from the hegemony to which they are subjected.
- And if untrammelled individualism consequently becomes the order of the day, what is to prevent all forms all forms of mutual solidarity steadily falling apart, with exception, perhaps, of a *qaumic* sense of hostility to all aliens.

As ever, well-meaning efforts to implement social engineering can often have disastrous consequences – most especially when the arena within which the project of 'improvement' is implemented is ethnically and religiously plural in character.

What though, about developments in Dar ul-Islam? Had the nineteenth and early 20<sup>th</sup> century reformers been more aware of the prospects that they, too, might run into just the same disasters if they adopted the premises of the European enlightenment – even if they took the precaution of doing so on what I have described on an upside-down basis. However in doing so they overlooked just how destructive the Enlightenment's iconoclastic vision of untrammelled personal freedom as a 'natural' – and in that sense a God-given – right could be in what we have come to describe as the 'modern' era.

## 7. Potential Solutions?

So is there any alternative to such 'rational' assumptions? Reflecting on these issues nearly a century ago, Max Weber drew a distinction between those societies – most of which were located in the past – whose conceptual orders were grounded within an 'enchanted' universe, as opposed to the 'disenchanted' universe he saw growing up around him. Little did he know that he was only standing on the edge of a massive conceptual shift, since there can be little doubt the conceptual universes which can be found in the contemporary global order are far more 'disenchanted' – and in that sense individualistically oriented – than they were in his day.

However the more we explore the pre-modern era, the more stable, the more equitable, and above all the meaningful the conceptual orders of our pre-enlightened past turn out to be, no matter how much the value of its resources may have been side-lined by our contemporary visions of progress and modernity. That is in no way to suggest that the past was *ipso facto* 'more perfect' than the present above all because I know of no yardstick against which such a vision of perfection can be measured. Rather it is simply to observe that the 'enchanted universes' construct in the past after a great deal to teach us in the increasingly chaotic present.

With that in mind, Islam in its pre-modern form has a great deal to teach us, no less spiritually than socially. At a spiritual level Islamic mystics such as Ibn 'Arabi have built on the resources of the Qur'an on the one hand, and Greek, Jewish and Christian theology to build what best be identified as a veritable palace of an conceptually grounded enchanted universe, whose influence has spread to every corner of Dar ul-Islam, where it still remains influential to this day. Meanwhile the behavioural and socio-cultural sphere the premises of Shari'a provide an advisory map – based once again on the resources of Qur'an and the Hadith – on the manner in which believers can seek to bring all aspects of their personal lifestyles into the closer and closer conformity with the premises of Allah's created universe, of which we are all an integral part.

But however personalised that advice may be, it is a great mistake to assume that it is individualistically oriented: just as all *insa'an*, human beings, in other words, are integral parts of Allah's creation, and indeed the most perfectible components of what can best be described as an enchanted universe, so they are also integral parts of the social universe which they consequently create around themselves. However a further message which pervades the Qur'an, and which is constantly reinforced in the Shari'a, is the huge significance of *insa'af*, social justice. Hence whilst the greater part of the behaviour dimension of the Shari'a deals with matters of contract, and most particularly with *nikah* as the contractual foundation of the family, and hence the keystone of the entire social order, its vision of the implications such contracts could hardly be more different from that which became more different from that which developed in Western Europe, and consequently became embedded in the premises of the European enlightenment.

For Muslims, *insa'an* are no sense born 'free'. Rather they arrive as part and parcel of Allah's created universe, which – certainly from a Sufi perspective – is a manifestation of Allah Himself. As such *insa'an* are born not so much with rights, but rather with obligations to the Creator – and hence to His

created universe, which of necessity includes the social order which *insa'an* of all kinds, have built around themselves. Hence Islamic contracts are in no way a one way bet: rather they are grounded in obligations which give rise to counter counter-obligations: in other words they are in no way a one-way bet, in which the free-ranging premises of *caveat emptor* are the order of the day. Hence the Shari'a – and especially its localised conventions of '*urf* – have always encouraged the growth of networks of mutual reciprocity, and hence of mutual trust, in all familial and commercial contexts. It also followed that in such contexts the application of law was much more a matter of dispute resolution, and the reconstruction of the social order on an equitable basis, rather than the imposition of sanctions such as incarceration on the person deemed to guilty party: on the contrary the most powerful sanction against malfeasance was the prospect that the community as a whole might cast the offender aside, by excluding him (or more unusually her) from the networks of reciprocity of he had hitherto been an integral part.

Moreover in these circumstances, as we have seen, the state plays a far less salient role in everyday life than it does in post-enlightenment contexts: rather the social order was instead composed of a plurality of internally-coordinated self-governing communities, in which the Emir only intervened to knock heads together if matters got completely out of hand. With such considerations in mind I am not seeking to suggest that the Shari'a can necessarily be restored in its classical sense. Indeed I think that is most unlikely. However what we can do is learn from our mistakes, no less in Euro-America than in Dar ul-Islam, by backing away from the flawed dimensions of the premises of the enlightenment in order to produce a more stable, and above a more equitable, moral, economic, familial and spiritual order, which feels far more comfortable with the prospect of plurality than is currently the case in so many contemporary jurisdictions – and most especially in those located within the borders of what remains of a 'modernised' Dar ul-Islam. .

## Bibliography

- Ballard, Roger 2013 "Hundi, Hawala and 'Islamic Banking': remittances, credit and finance in the Diaspora" in *The Routledge Handbook of South Asian Diasporas* London: Routledge
- Ballard, Roger, 2011a, "Honour Killing? Or just plain homicide?" in Holden, Livia (ed) *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* London: Routledge p. 124 - 147
- Ballard, Roger, 2011b "The Re-establishment of Meaning and Purpose: *Mādri* and *Padre Muzhub* in the Punjabi Diaspora" in Olwig, Karen (ed) *Mobile Bodies, Mobile Souls: Family, religion, and migration in a global world* Aarhus: University of Aarhus Press p. 27 - 53.
- Ballard, Roger 2010 "Three Phases of Globalisation: the significance of Dubai's emergence as a trading hub" in Pieterse, Jan (ed) *21st Century Globalisation: Perspectives from the Gulf* Dubai: Sheikh Zaidi University 39 - 71
- Ballard, Roger 2009 "Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?" in Grillo, Ballard, Ferrari, J. Hoekema, and Shah (eds) *Legal Practice and Cultural Diversity* Aldgate
- Ballard, Roger 2007 "Living with difference: a forgotten art in urgent need of revival?" in Hinnells, J (ed) *Religious Reconstruction in the South Asian Diasporas: From one generation to another* London: Palgrave Macmillan 2007
- Ballard, Roger 2006 "Popular Islam in Northern Pakistan and its Reconstruction in Urban Britain" in Hinnells and Malik (eds.) *Sufism in the West* London: Routledge
- Ballard, Roger 2003 "The South Asian Presence in Britain and its Transnational Connections" in Singh, H. and Vertovec, S. (eds) *Culture and Economy in the Indian Diaspora*, London: Routledge
- Ballard, Roger 2000 "Panth, Kismet, Dharm te Qaum: Four dimensions in Punjabi Religion" in Singh, Pritam and Thandi, Shinder (eds.) *Punjabi Identity in a Global Context* Delhi, Oxford University Press,
- Chaudhary, Muhammed Azam, 1999, *Justice in Practice: The legal ethnography of a Punjabi village* Oxford University Press
- Chittick, William 1989 *The Sufi Path of Knowledge: Ibn Al-Arabi's Metaphysics of Imagination* State University of New York Press
- Durkheim, Émile 1984 [1893] *The Division of Labour in Society* The Free Press
- Eaton, Richard, 1993, *The Rise of Islam on the Bengal frontier 1204 – 1706* University of California Press
- Gray, John 2009 *False Dawn: The Delusions of Global Capitalism* Granta Publications
- Gray, John 2008, *Black Mass: Apocalyptic Religion and the Death of Utopia* Penguin Books
- Gray, John 2000 *Two Faces of Liberalism* Polity Press
- Hallaq, Wael 2009 *Shari'a: Theory, Practice, Transformations* Cambridge University Press.
- Lyon, Stephen 2004. *An anthropological analysis of local politics and patronage in a Pakistani village* Lampeter: Edwin Mellen Press.
- Macfarlane, Alan 1979 *The Origins of English Individualism* Cambridge University Press

Maine, Henry, 2008 [1862] *Ancient Law* Read Books

Mahmood Mamdani, 2004 *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terrorism*, New York: Pantheon,

Mantena, Karuna 2011 *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* Princeton University Press.

Mason, Philip 1948 *Call the next Witness* London: British Publishers Guild

Oberoi, Harjot 1994 *The Construction of Religious Boundaries: Culture, Identity and Diversity in the Sikh Tradition* Delhi: Oxford University Press.

Roebuck, Derek 2008, *Early English Arbitration* The Arbitration Press

Rosen, Lawrence 1989 *The Anthropology of Justice: Law as Culture in Islamic Society* Cambridge University Press

Said, Edward 1978 *Orientalism* Vintage Books

Weber, Max *Science as a Vocation* Indianapolis: Hackett 2004 [1919]

Wormald, Patrick 2001 *The Making of English Law: King Alfred to the Twelfth Century: Legislation and Its Limits* Oxford: Blackwells